Hong Kong Institute of
Certified Public Accountants
香港會計師公會

Dear Assignment / News / Business Section Editor

Hong Kong Institute of Certified Public Accountants takes disciplinary action against a certified public accountant (practising), a certified public accountant and a firm of certified public accountants

(HONG KONG, 23 July 2014) — A Disciplinary Committee of the Hong Kong Institute of Certified Public Accountants reprimanded Ernst & Young ("EY") (firm number 0422) and Yen Kai Shun, Catherine ("Catherine Yen") (membership number F02309) on 22 July 2014. They were ordered to pay to the Institute penalties of HK$150,000 and HK$100,000 respectively for their failures or neglect to observe, maintain or otherwise apply professional standards issued by the Institute. The Disciplinary Committee also ordered removal of the name of Wu Ting Yuk, Anthony ("Anthony Wu") (membership no. F02308) from the register of certified public accountants for a period of 2 years, and payment to the Institute of a penalty of HK$250,000.

In addition, EY, Catherine Yen and Anthony Wu ("Respondents") were ordered to pay the costs of the disciplinary and investigation proceedings of HK$2 million.

On 24 December 2013, the Disciplinary Committee handed down its determination against the Respondents in respect of their involvement in the auditing of the accounts of a group company. The Disciplinary Committee found as follows:

(a) EY was found guilty of failing or neglecting to observe, maintain or otherwise apply a professional standard, namely Statement 1.203 "Professional Ethics – Integrity, Objectivity and Independence", as they had failed to be, and be seen to be, free of any interest which might detract from their objectivity in accepting or continuing the professional work they undertook in connection with the audit of a company or companies in the Group in respect of the financial years 31 December 1995 to 31 December 1997. The Disciplinary Committee found that EY had failed to have any or any adequate review machinery which would have alerted it to the risk of the appearance of its independence being impaired.

(b) Catherine Yen was found guilty of failing or neglecting to observe, maintain or otherwise apply a professional standard, namely Statement 1.203 "Professional Ethics – Integrity, Objectivity and Independence", as she had failed to be, and be seen to be, free of any interest which might detract from her objectivity in accepting or continuing the professional work she undertook in connection with the audit of a company or companies in the Group in respect of the financial years 31 December 1995 to 31 December 1997.

(c) Anthony Wu was found guilty of professional misconduct, as a result of his failure to observe, maintain or otherwise apply the independence requirements of the Institute, namely Statements of Professional Ethics 1.200 "Professional Ethics –Explanatory Foreword" and Statement 1.203 "Professional Ethics –Integrity, Objectivity and Independence", by participating in the management of or otherwise having an involvement with the company and its subsidiaries whilst also a senior partner of EY who acted as auditors of the company in respect of the financial years ended 31 December 1995 to 31 December 1997, and whilst being a deemed auditor under section 131(9) of the then Companies Ordinance, Cap. 32.

Having taken into account the circumstances of the case, the Disciplinary Committee made the above order against the Respondents under section 35(1) of the Professional Accountants Ordinance.

Under the ordinance, if the Respondents are aggrieved by the order, they may give notice of an appeal to the Court of Appeal within 30 days after they are served the order.

The Disciplinary Committee's Determination and Decision on Sanctions and Costs are available at the Institute's website under the "Compliance" section at http://www.hkicpa.org.hk.

Disciplinary proceedings of the Institute are conducted in accordance with Part V of the ordinance by a five-member Disciplinary Committee. The majority (three members) of each committee, including the chairman, are non-accountants chosen from a panel appointed by the Chief Executive of the HKSAR, and the other two members are CPAs.

Disciplinary hearings are held in public unless the Disciplinary Committee directs otherwise in the interests of justice. A hearing schedule is available at the Institute's website. A CPA who feels aggrieved by an order made by a Disciplinary Committee may appeal to the Court of Appeal, which may confirm, vary or reverse the order.

The Disciplinary Committees have the power to sanction members, member practices and registered students. Sanctions include temporary or permanent removal from membership or cancellation of a practising certificate, a reprimand, a penalty of up to $500,000, and payment of costs and expenses of the proceedings.

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About the Hong Kong Institute of Certified Public Accountants

The Hong Kong Institute of CPAs is the only body authorized by law to register and grant practising certificates to certified public accountants in Hong Kong. The Institute has more than 37,000 members and more than 17,000 registered students. Members of the Institute are entitled to the description *certified public accountant* and to the designation CPA.

The Hong Kong Institute of CPAs evolved from the Hong Kong Society of Accountants, which was established on 1 January 1973.

The Institute operates under the Professional Accountants Ordinance and works in the public interest. The Institute has wide-ranging responsibilities, including assuring the quality of entry into the profession through its postgraduate qualification programme and promulgating financial reporting, auditing and ethical standards in Hong Kong. The Institute has responsibility for regulating and promoting efficient accounting practices in Hong Kong to safeguard its leadership as an international financial centre.

The Hong Kong Institute of CPAs is a member of the Global Accounting Alliance – an alliance of the world's leading professional accountancy bodies, which was formed in 2005. The GAA promotes quality services, collaborates on important international issues and works with national regulators, governments and stakeholders.

Hong Kong Institute of CPAs' contact information:

Stella To
Deputy Director, Communications
Phone: 2287 7209
Mobile: 9027 7323
Email: stella@hkicpa.org.hk

Proceedings No: D-03-IC16H

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	
ERNST & YOUNG (A FIRM)	1st Respondent
CATHERINE YEN KAI SHUN	2nd Respondent
ANTHONY WU TING YUK	3rd Respondent

DECISION ON SANCTIONS AND COSTS

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1. By our Determination which was handed down on 24th December 2013, we found R1 and R2 guilty of failure or neglect to observe, maintain or otherwise apply a professional standard {Complaints 1 and 3 respectively} and R3 guilty of professional misconduct {Complaint 4}. We acquitted R2 of the more serious charge of professional misconduct.

2. We then gave directions for the parties to respectively file submissions on sanctions and costs which the parties agreed could be determined by us without requiring an oral hearing on the matter.

3. The Complainant filed their submissions on 21st January and the Respondents filed their submissions on 11th February 2014. The Complainant was granted leave to file Further Written Submissions in response to the submissions filed

by the Respondents on 21st February. This was followed by a letter in response from the solicitors for R3 dated 28th February 2014.

A. BACKGROUND

4. We are mindful of the fact that all these complaints against the Respondents arise from the preparation and auditing of the accounts of an entity called New China Group {NCG} for the period 31st December 1995 - 31st December 1997. NCG went into liquidation in early 1999.

5. On 10th June 2003 the Institute decided to constitute an Investigation Committee {IC} to investigate into the relationship between the Respondents and NCG. The IC was only able to complete its report on 10th October 2009, more than 6 years after it had been established. As we had observed in our Determination, such a long and unexplained delay was "regrettable and inexcusable." {paragraph 179} We readily recognise and accept that such delay was not in anyway attributable to any of the Respondents.

6. We also remind ourselves that in respect of each of the Respondents the gravamen of the charges that they have been found guilty of relates to the *appearance* of independence being compromised. There is no suggestion or any evidence that their independence was actually compromised in respect of any of them. It is however recognised by all parties concerned that the principle of independence is the bedrock of the accountancy profession and that the *appearance* of independence is as important as the fact of such independence. It is also further recognised by all parties that public confidence in this fundamental principle of independence has to be maintained and preserved.

7. It was argued on behalf of all Respondents that any proposed sanction should not be too severe having due regard to the reputation, character, reliability, financial integrity, clean disciplinary record and personal circumstances and background of each of the Respondents. It was said that the Committee should

approach the question of penalty from a consideration firstly of the lesser rather than the more severe penalty.

B. The Section 35B Issue

8. It was argued that the breaches of the standards by R1 and 2 were not intentional but inadvertent. The NCG retainer to R1 was secured in 1993, which was not a period covered by the complaints and therefore it was argued that neither R1 nor R2 should be penalised for the same.

9. It was suggested that previous senior management had approved the retainer in 1993 and the previous engagement partner had not considered there was any risk of the appearance of independence being compromised for R1 to continue the retainer. The implication of this contention was that the actions of the senior management of R1 for the years 1995-1998 and/or R2 who was only appointed the engagement partner in July 1996 should not be viewed with too critical an eye.

10. It was contended that we should take into account the fact that R1 and 2 had offered to admit the complaints which they were found guilty of as far back as 20th February 2013 pursuant to section 35B(1) of PAO {cap 50} but that the Institute "*declined to participate in discussions for a settlement.*"

11. The Complainant countered that the power and decision whether the complaints should be dealt by way of a consent order under section 35B was a matter entirely for the Committee to initiate, and was not a matter that either the Complainant or the Respondents can agree on to 'settle' the proceedings. It was pointed out that the invoking of the section 35B procedure would in effect leave the Committee with a limited range of sanction options and that too at a considerably lower scale.

12. In our view, when section 35B is properly construed, the procedure only comes into play *if the Committee* takes the initiative and makes the offer to the parties. It is not a procedure that the Institute and the Respondents can of their own

accord agree upon and/or either of the parties could unilaterally request the Committee to initiate such an offer. The downside of such an initiative is that if any party refuses the initiative offer, then the proceedings have to be terminated and the Committee dissolved and a new Committee has to be appointed to hear the complaints.

13. By a letter dated 20th February 2013, the solicitors for the Institute wrote to the Clerk to the Committee in response to the offer letters from the respective solicitors for the Respondents of the same date raising the issue of the section 35B procedure. The Institute's solicitors indicated that the Institute had considered this possibility and had come to the view that it was not appropriate in the present case and categorically indicated that the "*Institute will not be a party to any application for a consent order.*"

14. The Committee carefully considered the documents that the parties had filed in support of their respective cases, the complaints themselves and the position of the parties as reflected in their letters of 20th February 2013. Taking into account all the circumstances, the Committee was of the view that it would not be appropriate in the present case to invoke the section 35B procedure having regard to the nature and gravity of the complaints.

15. After careful consideration the Committee directed its Clerk to inform the parties by a letter dated 27th February 2013 that the Committee was of the view that the complaints should be determined at a full and substantive hearing, which was scheduled to be heard in May 2013. After a four day hearing our Determination was handed down on 24th December 2013.

C. 1st RESPONDENT

16. It was argued on behalf of R1 that it is a very different entity today as compared to 20 years ago. It was suggested that the post-Enron regulatory environment that prevails today is very different from the internal control systems that prevailed 20 years ago. It was argued that R1 now had very

differently constituted partners who would now have to bear the reputational damage as a result of our Determination and the financial consequences of any sanctions and costs orders we may make. It was implied that this unfair result is the unfortunate consequence of the inordinate and inexcusable delay that has accompanied these disciplinary proceedings.

17. We take on board the force of these arguments. However, in our view they do not impact on the fact that R1 was found guilty of breach of independence and/or appearance of independence requirements of the Statements. These core requirements would have been the same whether now or 20 years ago and are unrelated to the changes brought about in the regulatory framework in the post-Enron period. Whether R1's partners today or at the relevant time of the breaches would be responsible for the consequences of any orders this Committee makes is not a matter that really concerns us. That is an internal matter for R1.

18. We would also observe that in the case of R1, they had internal policies and manuals addressing the importance of maintaining and upholding the precepts of independence. However, as a large reputable and international accountancy practice they appear to have singularly failed to observe and adhere to their own internal policies and standards. In our view, the responsibility placed upon such a large and established accounting practice to observe and adhere to the Statements of the Institute is greater than say that of a small one man practice. In a similar vein the public's perception of integrity, confidence and expectation of a firm such as R1 would necessarily and understandably be higher.

19. It is the failure of R1 to adhere to its own high standards and/or turning a blind eye to its breaches as well as the failure to discharge its obligations to the public that are a reflection of the serious nature of the breach committed by R1. This failure was compounded by a failure to acknowledge and accept that they

have fallen short of their own high standards by the vigorous defence that they advanced throughout these proceedings.

20. We fully recognise that it is a constitutional right of any person/entity who face a complaint to defend the charge and require the complainant to prove the charge presented. At the same time, if the party against whom a complaint has been made recognizes that they have been at fault, then the proper course would be to acknowledge the wrongdoing instead of adopting an all out defence strategy, even though tacitly recognising that it may have been wrong by raising the issue of a section 35B procedure. We are not punishing R1 for defending the proceedings, but equally we do not believe that any credit can be extended to them for their raising the section 35B "settlement offer."

21. We have taken into account all the cases referred us by the parties. We however take the view that each case must be decided upon its own particular facts. We do not believe that there is any binding precedent on us that circumscribes our sentencing options. In our view, the matter is by and large in our discretion. Taking into account all the relevant matters urged upon us we are of the view that the following sentence and sanctions are appropriate in the case of R1:

(a) R1 is reprimanded for its breaches of the Statements;

(b) R1 is fined the sum of $150,000;

(c) R1 does pay the costs of the Complainant.

22. We are cogniscant of the fact that the fine that we have imposed at first blush appears to be relatively higher than in other cases. The maximum fine pursuant to section 35(1)(c) is $500,000. It occurs to us that the managing partners of R1 at the time of these complaints were the gatekeepers entrusted with the role and responsibility to ensure that the firm and all its members adhere to the highest standards of practice and ensure proper and due compliance with their own internal policies as well as adherence the Standards.

23. We believe the time has come for the message to be sent out to all the members of the accounting profession that failure to maintain standards and comply with proper practice will attract heavier sanction in terms of fines from the Disciplinary Committee in an appropriate case. In the case of R1 in the present case, the breach of maintaining the appearance of independence was not a one-off incident but one that was repeated over a number of years. It was a breach that would have probably continued but for the fact that NCG went into provisional liquidation in early 1999. We believe that given the persistent nature of the breach, the amount of fine to be imposed should reflect the seriousness of the persistent breach involved in the case of R1.

D. 2nd RESPONDENT

24. We were told that the R2 was registered as an accountant in January 1990 and has been in active practice for the last 24 years with an unblemished record, save for this case. She was admitted as a partner of R1 in 1996 and became the engagement partner for NCG as of 1st July 1996. Our attention has been drawn to the considerable public service that she has performed where she has generously and unselfishly given her time and efforts, including serving in a number of statutory bodies and public interest bodies.

25. We recognise that it is a reflection of R2's ability and hard work that she was made a partner of R1, an international and highly reputed accountancy practice, at the relatively young age of 32 years. We recognise that when R2 was appointed as the engagement partner for the NCG in July 1996, she was probably one of the more junior partners of R1, and that she was taking over from a probably more senior and experienced partner. That partner, for whatever reasons, failed to realise or recognise the risk of the appearance of independence being compromised in R1 taking up appointment as the auditor and tax representative for the NCG of companies whilst at the same time

having a retainer for the provision of financial advice by R3 at the same time as being a member of the Executive Committee of NCG.

26. We have no evidence before us as to whether R2 was in fact lulled into a false sense of comfort or security that the previous engagement partner did not perceive or recognise any risk that the appearance of independence. We are prepared, if necessary, to assume in her favour that she may well have been so lulled. To that extent it can be properly and fairly said on her behalf that her breach was not as culpable as it otherwise might be.

27. We have made due and proper allowances for the above-mentioned matters. At the same time we are also of the view that the obligations imposed by the Standards on every accountant who is a member of the Institute are personal and demand adherence, compliance and vigilance on the part of each member to ensure that independence and/or the appearance of independence, which is the bedrock of the accountancy profession, is not compromised or put at potential risk. This is not an obligation that can be abdicated by a member assuming that someone else would or must have done the necessary due diligence. It is imperative that all members of the Institute understand, appreciate and comply with this important obligation imposed one each of them. To condone abdication of responsibility and reliance on a third party to have carried out the necessary due diligence would lead to going down the slippery road that would undermine the fundamental foundation that underpins the accountancy profession.

28. Taking into account all the matters urged upon us on behalf of R2 as well having regard to all the relevant circumstances, we are of the view that the following sentence and sanctions would be appropriate in her case:

(a) R2 is reprimanded for breaches of the Statements;

(b) R2 is fined the sum of $100,000;

(c) R2 does pay the costs of the Complainant.

E. 3rd RESPONDENT

29. It was argued on behalf of R3 that he recognises that the appearance of independence was an important and serious obligation of the accounting profession. Further that it was also recognised by R3 that the findings of this Committee in its Determination dated 24th December 2013 reflected breaches by R3 that were serious, flagrant and inexcusable.

30. It was submitted that R3 did not personally benefit or profit from his conduct and that at no time was there any attempt to conceal or deny his role or conduct in respect of NCG and his role as the Financial Adviser to its Executive Committee. It was contended that R3 accepts that he needs to be punished for being found guilty of professional misconduct. It was argued that however the penalties suggested by the complainant in terms of removal of R3 from the register would be excessive and disproportionate. This, it was argued was particularly so when on the evidence adduced in the present case there was absent any suggestion or evidence of any deliberate dishonesty or criminal behaviour or other serious or aggravating features.

31. We were referred to a number of previous decisions by Disciplinary Committees and we have carefully reviewed those decisions. As observed earlier, we are of the view that the decision in each case has to be viewed from the context of its own set of facts and surrounding circumstances. There is no binding precedent or point of principle that is engaged so as to circumscribe this Committee in arriving at its decision as to the appropriate sanctions to be imposed in respect of R3.

32. It was submitted on his behalf that R3 has had hitherto an unblemished disciplinary record since he commenced his accounting career as an Audit Trainee in the UK more than 39 years ago in 1975. It was impressed upon us that R3 was a prominent public figure who has been very active in providing unremunerated public services and charitable work since he returned to Hong Kong in 1982. We have carefully reviewed the various organisations and public

bodies identified in paragraph 12.5 of R3's submissions on sanctions and costs that it is said R3 has been associated and involved with over the years. We recognise and accept that R3's contribution in terms of public service is extensive, salutary and exemplary.

33. We also accept that the adverse publicity that this case has generated and the stigma of having been found guilty of professional misconduct is likely to entail reputational damage and social embarrassment for R3. We would also observe that to a large extent he is the architect of his considerable fall from grace. R3 was a very experienced accountant by the time he came to be involved with the NCG of companies and someone who must have known of the fundamental importance of the appearance of independence.

34. Given that considerable experience, it is surprising that R3 did not recognise or appreciate that the principle of independence or the appearance of independence may be compromised in the light of the nature and extent of his involvement with the NCG of companies as the Financial Adviser to its Executive Committee for which R1 was being handsomely rewarded the sum of $100,000 a month, being a signatory to 13 bank accounts of the NCG while being a partner of R1 which was undertaking the audit of NCG and its subsidiaries and earning audit fees thereon combined with his personal dealings with some of the NCG subsidiaries who were also audit clients of R1.

35. We would only observe that this failure and lack of insight of this potential compromise persisted through the course of the disciplinary hearings where R3 mounted and maintained a staunch defence of the complaints made against him by the Institute. This suggests to us that he has not even now gained sufficient and true introspection of the nature, extent and seriousness of the breaches that he had committed and how it would damage the reputation of the accountancy profession as a whole. It is this lack of insight that has caused the Committee some concern.

36. We were told that R3 resigned as Chairman of R1 in 2005 and has not renewed his practising certificate with the Institute since 2006. It is said that consequently R3 has suffered a considerable loss of income and 'loss of fulfillment' due to this unexpected and premature end to his professional life. We would only observe that the decision to cease practising as a CPA and the consequent loss of income would appear to be as a result of a decision and choice made by R3 himself for reasons best known to him.

37. We were told that R3 has not practiced as an accountant since 2005 and that he apparently has no present intention to resume such practice. It was therefore argued that the risk of R3 re-offending in respect of the conduct in respect of which he has been found guilty by this Committee, and that any sanction to be considered by this Committee should bear this in mind.

38. It was argued on behalf of the Complainant that it may be appropriate in the case of R3 to consider the removal of his name from the register of CPAs bearing in mind the seriousness of the contraventions he has committed. On the other hand it was argued on behalf of R3 that there were no elements of dishonesty or criminal behaviour involved here and that the suggested sanction by the Complainant would be excessive and disproportionate in all the circumstances.

39. We have carefully reviewed the various Decisions referred to us by the parties in this regard. We appreciate that suspension of practice or removal from the register are serious and severe penalties that are usually imposed in cases involving serious contraventions of the Statements of Professional Ethics and the PAO. We would also observe that such sanctions have usually been imposed in cases where the CPA has engaged in dishonest conduct or criminal activity and/or where there were other serious aggravating features.

40. We first considered whether in the case of R3 a reprimand would be sufficient to reflect the seriousness of his breaches together with a substantial fine as well as a costs order. Having carefully reviewed the evidence and our findings we

have come to the view that a reprimand does not and will not adequately reflect the very serious nature of the breaches committed by R3. His conduct as an experienced CPA and as a partner of an international practice undermined the very cornerstone edifice of the accountancy profession, namely independence and/or the appearance of independence.

41. The concept and principle of appearance of independence is fundamental to and a badge of honour for the accountancy profession. An accidental or a single instance breach of the independence principle may perhaps be viewed with some sympathy and indulgence. However, where the breaches were persistent, flagrant and inexcusable, as we have found in the case of R3, we believe that a serious view has to be taken of such conduct.

42. We are firmly of the view that a strong message needs to be sent out to the accountancy profession that serious and flagrant breaches of the core principle of independence or appearance of independence will be viewed seriously by the Disciplinary Committee of the Institute. Accordingly, such serious breaches will be visited with serious consequences in terms of sanctions. We believe that if the importance of this fundamental principle that underlines the accountancy profession is not emphasised, maintained and preserved, the intrinsic and core value of the profession will be seriously damaged and undermined.

43. In the case of R3, as we observed in paragraph 35 above, it seems to us that there appears to be even now a lack of proper insight or appreciation of the nature, extent and seriousness of the breaches that as a senior and experienced member of the accountancy profession he had committed. In our view, this lack of insight is a serious and aggravating factor in the present case.

44. We have come to the view that the nature and extent of the breaches by R3 in the present case are of sufficient gravity and consequence in terms of damaging the reputation of the accountancy profession as a whole that it would be appropriate to remove his name from the register. We have come to this view only after very careful deliberation and reflection of all the circumstances. We

believe that the appropriate period of such removal of his name be 2 years pursuant to section 35(1)(a).

45. Having considered all that has been urged upon us on behalf of R3 and taking into account all the circumstances surrounding his case, we are of the view that the following sanctions are appropriate in the case of R3:

(a) R3's name be removed from register for a period of 2 years and that a copy of this removal order be published in the Gazette;

(b) R3 is fined the sum of $250,000;

(c) R3 does pay the costs of the Complainant.

46. The fine that we have imposed reflects the seriousness of the breaches committed by R3 and the fact that it was not a one-off incident. It was conduct which was persisted with over a number of years and this in our view was an aggravating factor. We have had no evidence placed before us as to whether R3 made any declaration of interest involving an audit client to either R1 or R2 in respect of his personal dealings with any of the NCG companies. We have therefore not drawn any inferences against them in this regard. The possibility that R3 failed to make such a declaration perhaps undermines the submission that R3 was open about his conduct and that there was no attempt to deny or conceal his dealings.

47. We would observe that in imposing the sanctions against each of the Respondents we have fully taken into account the delay that has been occasioned in the bringing these disciplinary proceedings to a hearing and final determination. But as we had indicated in our Determination when we declined to stay these proceedings on the ground of delay {paragraph 45}, we were however satisfied that despite the delay the Respondents could have a fair hearing before us and were not seriously prejudiced in putting up their defence in this case.

F. COSTS

48. It is not disputed by the respondents that the Complainant is entitled to costs on the principle that costs should follow the event. What is in strenuous dispute is as to amount of costs that the Complainant should be awarded.

49. The Complainant has provided a Statement of Costs dated 21st January 2014 which claims a total sum of $3,582,028.15. This is clearly a substantial sum in the context of disciplinary proceedings. It is the Complainant's case that the Respondents should pay its costs and that of the Committee in full. It relies particularly on paragraph 70(3) of the Guidelines for the Chairman and the Committee Administering the Disciplinary Committee Proceedings Rules which states as follows:

"*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 necessarily incurred. The Committee may reduce the amount awarded to the extent it considers that costs 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...*"

50. It was the Complainant's position that the Institute was a self regulating professional body which is principally funded by fees paid by its members. It was contended that it would be wrong in principle to require the Institute members to have to bear the costs that have arisen and been incurred as a consequence of the disciplinary breaches by the Respondents. It was suggested that fairness and justice requires that the Respondents alone should bear the burden.

51. It was further argued that there should be no apportionment of costs in the present case just because R2 was successful in defending the 2nd Complaint of professional misconduct. It was argued that no additional costs were incurred

or wasted as the evidence in respect of Complaints 2 and 3 that were leveled against R2 were essentially the same.

52. On the other hand it was argued on behalf of R1 and R2 that apportionment was appropriate in respect of what is claimed to be the successful defence by R2 of the professional misconduct charge the subject matter of Complaint 2. It was argued that as R1 had a reputational interest in the outcome of the complaint against R2 and as they were jointly represented it would be both difficult and artificial to separate their costs.

53. It was further contended that it was unreasonable for the Complainant to pursue the charge of professional misconduct against R2, which in consequence necessitated her in staunchly defending it. It was said that if the lesser charge had been pursued, then a more pragmatic approach may have been taken by R2 in respect of the same.

54. On behalf of R3 it was submitted that the Complainant was not a complete victor as it had failed to establish that R3 was participating in the management of NCG in the light of the Committee's finding that there was insufficient evidence to support this platform of the Complainant's case. We note the force of this submission but in our view it was not incumbent on the Complainant to establish every factual allegation that underpinned the basis of Complaint 4. We note that the basis of this factual allegation was the undisputed fact that R3 attended 167 of the 199 Executive Committee meetings of NCG between 1993 and 1999 when it went into liquidation and that he was an authorised signatory to 13 bank account of NCG.

55. As we observed in our Determination: "*The fact that he is an authorized signatory to 13 bank accounts of NCG for the relevant years of 1995-1998 would prima facie raise the suspicion that he was exercising management functions, as cheque signing would usually be considered to be a function of management.*" {paragraph 149}

56. It is worth repeating the reasons why in our view the Complainant had failed to establish to our satisfaction that R3 was participating in management of NCG:

152. *"In our view there is a high index of suspicion that given R3's own admitted close involvement with the initial promoters of the group, his considerable efforts to get the Group funded and his close relationship with the Chairman that R3 may have been participating in the management of NCG. This is an extremely serious charge to make against an accountancy professional and therefore requires clear, cogent and compelling evidence to bring home the charge.*

153. *However on closer analysis, we are of the view that taken at its highest this remains just that –suspicion. In our view even if one piles suspicion upon suspicion it does not elevate itself to become proof of the fact that the Complainant needs to establish of actual participation by R3 in the management of NCG."*

57. In the light of the above, we do not believe that the fact the allegation of participation in the management was not established does not in anyway detract from the Complainant's entitlement to costs of these proceedings and investigation.

58. We have considered the arguments of R1 and R2 regarding apportionment of costs by reason of the 2nd Complaint against R2 not being established. We have carefully reviewed the evidence adduced and the submissions made in respect of Complaints 2 and 3, the latter being an alternative to the former. In our view the evidence was essentially the same in respect of both Complaints and the issue was simply whether the identical evidence established professional misconduct or breach of professional standards.

59. This was a matter for the Committee to come to a view on having regard to all the circumstances. In our view it was a complaint that the Institute was entitled to legitimately and reasonably present for the consideration of the Committee.

In our view no additional time or costs were wasted or incurred by reason of pursuing Complaint 2 in the circumstances of this case.

60. It was suggested that if only Complaint 3 was pursued, R2 may have approached the matter in a more pragmatic manner. The implication of this suggestion was that R2 may have admitted the less serious complaint. We would observe that the fact remains that it was open to R2 to reach some accommodation with the Complainant on this. She could have offered to admit Complaint 3 if Complaint 2 was not pursued. Alternatively, she could have openly admitted to us Complaint 3 and maintained her denial of Complaint 2. She however chose not to do so. The section 35B procedure that R2's solicitors flirted with came with circumscribing and limiting the Committee's sanction options, which we declined to do. In our view, if R2 was genuinely intent on saving time and costs it was open for her to have done so.

61. The more pertinent question in our view is whether the costs as claimed by the Institute in the total sum of over $3.58 million are reasonable and were necessarily incurred. The Respondents in unison complain that the amount claimed by the Complainant is prima facie unreasonable and excessive.

62. In particular complaint is made about the number of fee-earners that are claimed to be involved in the presentation of the Complainant's case. It is queried why the Complainant's solicitors would require to spend a total of 472.7 hours at a cost of $1,596,288.35, combined with the Institute's staff allegedly expending a total of 312.5 hours at a cost of another $529,400 on top of leading counsel for the Complainant at a cost of almost $875,000. Implicit in the complaint here is that there would clearly appear to be duplication of work with so many professionals allegedly being involved.

63. The point is made that it would appear to be a matter of unnecessary extravagance for two solicitors to be present throughout the four day disciplinary hearing with four staff of the Institute also attending apparently for a total of 118 hours. We fail to see why it would be necessary for the Director

of Compliance to be present together with the Deputy Director and Associate Director of Compliance during the entirety of the 4 days hearing.

64. We also note a claim of $13,744.50 under section C4 of the Statement of Costs for what is claimed to be Preparation of Witness Statements. There were no witnesses called at the hearing so we fail to understand what this item refers to. We would disallow this item. We also believe item G relating to disbursements allegedly expended by the Complainant's solicitors would appear to be excessive and we would allow only a sum of $7,000 in respect of this item.

65. We are of the view that there would appear to be a considerable element of duplication in the costs claimed by the Complainant. We do not believe that it would be fruitful to embark on an examination of each and every item of claim apart from the two we have identified above. We are of the view that a broad brush approach would be more appropriate in the circumstances of this case.

66. Approaching the matter in the round, we are of the view that the Complainant should be only entitled to costs of $2 million in total in respect of the investigation and the hearing. We therefore order that the Respondents pay this sum as costs.

G. CONCLUSION

67. In passing we would like to emphasise what we had expressed in our Determination, namely that the time has arrived for the Institute to carry out a thorough review and overhaul of its disciplinary investigation process and procedure. The delays that have plagued this case have been exceptional and regrettable. They do not reflect well on a professional body which has been given the privilege and responsibility of self-regulation. It is important for the long term that public confidence in the Institute's ability to properly, efficiently and expeditiously handle complaints is maintained and fostered.

68. It is of fundamental importance that a professional accountant who has his professional ability or integrity called into question should not have

disciplinary allegations hanging over his/her head like a Damocles sword for any period longer than absolutely necessary. The pressure and tension that a professional accountant will be under when the subject of complaint and investigation is clear and obvious. Fairness and justice demands that the matter deserves and receives prompt and expeditious resolution by the Institute.

69. We would finally like to express our thanks to all counsel, their solicitors and the Clerk of the Committee for their considerable and able assistance in this matter.

Dated the 22nd day of July 2014

Kumar Ramanathan SC

Chairman Disciplinary Committee

James Taylor Fulton

Member

Dr. Lui Hon Kwong

Member

Tony Chan Tung Ngok

Member

Angelina Kwan

Member