

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

Ng Kay Lam

Respondent

DECISION ON SANCTION AND COSTS

Background

1. On 29th June 2009, at a Disciplinary Committee hearing, the Respondent was found to have breached s.34(1)(a)(vi) of the Professional Accountants Ordinance, Cap. 50 ("PAO") for reasons set out in the Committee's Reasons. The remaining issues to be determined are the sanction to be imposed and costs.
2. At the hearing on 7th September 2009, Mr. John Hickin of Messrs. JSM appeared for the Complainant and Ms Pauline Leung, on the instructions of Messrs. Tam & Partners appeared for the Respondent.

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

Here are our short reasons for the Order.

Relevant Legislations, Case Law and Guidelines on Sanction and Costs

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

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

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

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

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

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

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

Arguments of Parties, Analysis and Reasons for Decision

Sanction

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

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

Costs

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

to bear such costs.

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

Dated 24th December 2009

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

BETWEEN

The Registrar of the Council of
the Hong Kong Institute Certified
Public Accountants

Complainant

AND

Ng Kay Lam

Respondent

Disciplinary Committee Members:

REASONS

1. In these proceedings, the Complainant complains that the Respondent has breached section 34(1)(a)(vi) of the Professional Accountants Ordinance (Cap. 50) in that the Respondent failed or neglected to observe, maintain or otherwise apply paragraph 2 of Statement 1.203 of The Statement in the audit of the Financial Statements of Linfoot (Asia Pacific) Limited ("LAPL") for the year ended 31st December 2003 ("the Financial Statements") by his firm, K.L. Ng & Company.

Background

2. On 30th May 2005, the Complainant received a complaint ("the Complaint") from a Mr. L against K.L. Ng & Company and a Mr. R for breach of ethical standards of public accountants when K.L. Ng & Company acted as the auditors and audited the Financial Statements while Mr. R was an employee of K.L. Ng & Company and LAPL's Company Secretary.
3. The Respondent is at all material times a certified public accountant carrying on business as a sole proprietor in the name K.L. Ng & Company.
4. By a letter dated 23rd August 2005 to the Complainant, the Respondent admitted that Mr. R was a "part time accountant" of K.L. Ng & Company.
5. Mr. R was LAPL's Secretary since 1st September 2003: see LAPL's Annual Return dated 1st September 2003.
6. By a letter from Mr. L to the Complainant dated 25 August 2005, Mr. L complained that Mr. R was responsible for both preparing and auditing the financial statements of LAPL.
7. By a letter from the Respondent to the Complainant dated 25th November 2005, the Respondent admitted that Mr. R was responsible for preparing the accounts and performing audit work on behalf of K.L. Ng & Company for LAPL:

Mr. R was a former colleague of the undersigned and is an experienced auditor as he has over 20 years of auditing experience. LAPL was introduced by Mr. R to our firm in 1997. We requested him to prepare accounts and perform audit work on behalf of our firm for LAPL and he was remunerated for as a percentage of the audit fee. As far as we are aware, he received no remuneration from LAPL in order to maintain his independence. In September 2003, Mr. R requested us to allow LAPL to use our office as LAPL's registered office and Mr. R was also appointed Secretary of LAPL on 1 September 2003. The audit of LAPL for the year ended 31 December 2002 had then been prepared and reviewed by that time and subsequently signed and approved on 17 September 2003. On hind sight, we should have requested Mr. R not to act as LAPL's Secretary before we continue to act for LAPL for the year ended 31 December 2003. We believed that Mr. R would not impair his independence by acting in such capacity as Mr. R told the undersigned that his duty was to help preparing statutory filings for LAPL..."

8. Letters from Mr. B, Mr. G (both directors of LAPL) and Mr. R to this Committee all confirmed that Mr. R was LAPL's accountant, Company Secretary and was responsible for auditing LAPL's accounts on behalf of K.L. Ng & Company between 2003 and 2005.

9. In Mr. R's letter to this Committee dated 31st August 2008, he detailed his involvement in the accounts of LAPL:

"I have worked as a full time accountant in a Certified Public Accountants firm for 5 year where Mr. K.L. Ng was working. [LAPL] was introduced to him as a small job because its volume of transaction is small. I prepared the book-keeping work free of charge and prepared a draft audit report and handed to Mr. K.L. Ng for review and in return I received a percentage of audit fee which I think this was the normal and acceptable practice among small and medium sized Certified Public Accountant."

10. The Respondent accepted that Mr. R was involved in both preparing and auditing the Financial Statements of LAPL between 2003 and 2005: see Respondent's Case dated 5th September 2008.

11. The issue before the Committee was whether K.L. Ng & Company (in turn the Respondent) failed or neglected to observe, maintain or otherwise apply paragraph 2 of Statement 1.203 of the Statement auditing the Financial Statements when his employee Mr. R (1) at the relevant period, the Company Secretary of LAPL and (2) responsible for preparing the Financial Statements.

The Relevant Guidelines

12. Statement 1.203 of the Statement reads:

"THE STATEMENT

1. *Professional independence is a concept fundamental to the accountancy profession. It is essentially an attitude of mind characterized by integrity and an objective approach to professional work.*
2. *A member in public practice should be, and be seen to be, free in each professional assignment he undertakes of any interest which might detract from objectivity. The fact that this is self-evident in the exercise of the reporting function must not obscure its relevance in respect of other professional work...*

GUIDELINES

General

1. *It is the duty of an accountant to present or report on information objectively. That duty is the essence of professionalism and is appropriate to all accountants in public practice, in commerce, in industry and in the public services. Members should be guided, not merely by the terms, but also by the spirit of this Statement and the fact that particular conduct does not appear among a list of examples does not prevent it from amounting to misconduct.*

Personal relationships

12. *Close personal or business relationships can affect objectivity. There is a particular need, therefore, for a practice to ensure that its objective approach to any assignment is not endangered as a consequence of any such relationship. By way of example, problems may arise where the same partner or senior staff member works for a number of years on the same audit or where anyone in the practice has a mutual business interest, close friendship or relationship by blood or marriage with an officer or*

employee of a client or has an interest in a joint venture with a client or where the work is being done for a company dominated by one individual.

CONFLICTS OF INTEREST

Conflicts between a practice's interest and those of its client

51. *A practice should not accept or continue an engagement in which there is or is likely to be a significant conflict of interest between the practice and its clients.*
52. *Whether a significant conflict of interest exists will depend on all the circumstances of the case. The test is whether a reasonable observer, seized with all the facts, would consider the interest as likely to affect the objectivity of the practice. However, any material financial gain which accrues or is likely to accrue to the practice as a result of the engagement, otherwise than in the form of fees or other reward from the client for its services, or commission, etc. properly earned and declared under the terms of paragraph 53 below, will always amount to a significant conflict of interest."*

Application of the Relevant Guidelines to the Present Case

13. Having considered the evidence and submissions presented by the parties, this Committee considers the Respondent to have neglected to observe or apply paragraph 2 of Statement 1.203 of The Statement.
14. The purpose of the auditing system is so that the financial statements of a company prepared by officers of that company can be seen by a third party (not just other directors of the company) to have been objectively scrutinized and assessed by a disinterested public accountant. The Respondent clearly neglected to observe or apply the fundamental duty to "*...be seen to be, free in each professional assignment he undertakes of any interest which might detract from objectivity*" when he undertook to audit the Financial Statements that his own employee had prepared for a company, to which his own employee is Company Secretary of.

15. The Committee takes the view that
- a. the appointment of Mr. R as accountant, secretary and involved in the audit of LAPL for the Financial Statements were all disclosed to the directors and members through meetings of the Board,
 - b. the accounting and secretarial services rendered to LAPL by Mr. R were free of charge and out of his friendship with the directors of LAPL, or
 - c. there was no prejudice to any party involved in this case, as irrelevant factors when assessing whether there was a breach of paragraph 2 of Statement 1.203 of the Statement.

Conclusion

16. The Committee finds the complaint against the Respondent under section 34(1)(a)(vi) of the Professional Accountants Ordinance (Cap. 50) ("PAO") proved.
17. It remains for the Committee to decide on the Order to be made following the finding against the Respondent. The Committee directs as follows:
- a. The Clerk is to fix a date for a hearing by the Committee to receive submissions from the parties on the sanction to be imposed against the Respondent.
 - b. The Clerk and the Complainant are to file and serve their respective bills of costs and disbursements at least 14 days before the hearing before the Committee.
 - c. The parties are to file and serve their Skeleton Submissions together

with copies of the relevant authorities and other reference documents
at least 5 working days before the hearing before the Committee.

Dated the 29th day of June 2009.

Proceedings No: D-05-121C

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(Cap.50)

BETWEEN

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Complainant

and

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Respondent

REASONS

Dated the 29th day of June 2009.