



**NEW ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS ACT 1996**

**IN THE MATTER** of the New Zealand Institute of Chartered Accountants Act 1996 and the Rules made thereunder

**AND**

**IN THE MATTER** of **Stephen Naismith Fleming**, Suspended Chartered Accountant, of Auckland

---

**DETERMINATION OF THE DISCIPLINARY TRIBUNAL OF THE NEW ZEALAND  
INSTITUTE OF CHARTERED ACCOUNTANTS  
23 October 2012**

---

**Hearing:** 23 October 2012

**Tribunal:** Mr RJO Hoare FCA (Chairman)  
Mr GR Leech FCA  
Mr DP Scott CA (retired)  
Ms A Hauk-Willis (Lay member)

**Legal Assessor:** Mr Bruce Corkill QC

**Counsel:** Mr Terence Sissons for the prosecution

At a hearing of the Disciplinary Tribunal held in public at which the Member was not in attendance and not represented by counsel the Member entered no plea.

The charges and particulars as laid were as follows:

### **Charges**

**THAT** in terms of the New Zealand Institute of Chartered Accountants Act 1996 and the Rules made thereunder, and in particular Rule 21.30 the Member is guilty of:

1. Conduct unbecoming an accountant [all particulars]; and/or
2. Breaching the Institute's Rules and/or Code of Ethics, in particular:
  - a. The Fundamental Principles of Integrity and/or Professional Behaviour in the Code of Ethics [particular 1 and/or particular 6]; and/or
  - b. The Fundamental Principles of Objectivity and/or Independence and/or paragraphs 64 and/or 65 in the Code of Ethics and/or paragraphs 18 to 20 of Tax Guideline 1 ("TG1") [particular 2]; and/or
  - c. Rule 9 – *Due Care and Diligence* in the Code of Ethics [particular 3]; and/or
  - d. Rule 18.2(a) of the Institute's Rules (and its predecessor, Rule 18.2) [particular 4]; and/or
  - e. Paragraph 2.4(d) of Appendix IX to the Institute's Rules [particular 5]; and/or
  - f. Rules 21.2 and/or 21.4(b) of the Institute's Rules [particular 7]; and/or
  - g. Rule 21.4(d) of the Institute's Rules [particular 8].

### **Particulars**

#### **IN THAT**

Being a member of the New Zealand Institute of Chartered Accountants:

- (1) The Member used clients to obtain a donations tax rebate greater than that to which his own taxable income entitled him to, in breach of the Fundamental Principle(s) of Integrity and/or Professional Behaviour; and/or
- (2) As accountant for the clients who claimed the donation tax rebates, the Member failed to act with objectivity and independence by virtue of his involvement in all aspects of the transaction, in breach of the Fundamental Principle of Objectivity and Independence and/or paragraphs 64 and/or 65 of the Code of Ethics and/or paragraphs 18 to 20 of TG1; and/or
- (3) The Member failed to exercise due care and diligence in ensuring that the donation tax rebate claims made by his clients at his instigation were legitimate, in breach of Rule 9 – *Due Care and Diligence* in the Code of Ethics; and/or
- (4) The Member offered accounting services to the public without holding a Certificate of Public Practice:
  - (a) prior to 30 October 2008, in breach of Rule 18.2 of the Institute's Rules and/or the Fundamental Principles of Integrity and/or Professional Behaviour in the Code of Ethics; and/or

- (b) on or after 30 October 2008, in breach of Rule 18.2(a) of the Institute's Rules and/or the Fundamental Principles of Integrity and/or Professional Behaviour in the Code of Ethics; and/or
- (5) The Member directly or indirectly controlled Auckland Business Consultants Limited ("ABC Ltd") either personally or through his spouse in breach of paragraph 2.4(d) of Appendix IX to the Code of Ethics; and/or
- (6) The Member established and/or subsequently modified the company structure of ABC Ltd to circumvent the rules regarding public practice, in breach of the Fundamental Principle(s) of Integrity and/or Professional Behaviour in the Code of Ethics; and/or
- (7) The Member failed to respond and/or respond within a reasonable and proper time to correspondence from the Professional Conduct Committee, despite being required to do so in accordance with Rule(s) 21.2 and/or 21.4(b), specifically, the Institute's letters of 10 January and/or 15 February and/or 11 April and/or 8 May 2012.
- (8) The Member failed to attend the final determination hearing before the Professional Conduct Committee on 23 May 2012, despite being required to do so by the Professional Conduct Committee.

## **DECISION**

The charges and particulars the Member faced cover three matters:

1. The Member involved some of his clients in arrangements to obtain donations tax rebates the benefit of which went to himself. (Particulars 1, 2 and 3)
2. The Member offered accounting services to the public without having a Certificate of Public Practice. (Particulars 4, 5 and 6)
3. The Member failed to respond to correspondence in a reasonable time and he failed to attend his Final Determination hearing. (Particulars 7 and 8)

As to the first matter the Member promoted an arrangement to some 60 of his clients to accept funds from him on the condition that they would donate those funds to a charity which the Member was involved with and had a substantial economic interest in and where the Member required the resulting donations rebate to be paid to himself.

The Member failed to offer his clients the opportunity to take independent advice, he failed to disclose his conflict of interest in writing to them – a short conversation with a client does not constitute informed consent. The Member undertook only minimal enquiry as to the validity of these arrangements for taxation purposes, thereby potentially exposing his clients to repay the rebates that they had not received together with penalties and interest. The Tribunal therefore finds particulars 1, 2 and 3 proven.

In regards to particulars 4, 5 and 6 the Member has acknowledged that his practice was not operating in accordance with the Institute's Rules with respect to the requirements for a Certificate of Public Practice and he had tendered his resignation as a member of the Institute as a result. The Tribunal finds particulars 4, 5 and 6 have been proven.

In regards to particular 7 the Member did not respond to correspondence in a timely manner albeit he did belatedly reply.

In regards to Particular 8, the Member did not attend his Final Determination as required by the Rules. The Member did, however, unsuccessfully apply for revocation of his interim suspension and he did attend those proceedings in person and gave evidence.

The Member was charged with conduct unbecoming an accountant together with the seven specific breaches of the Rules and Code of Ethics. Having found all eight particulars proved the Tribunal finds the Member guilty of charge 2 (a) to (g).

Further having regard to the Member's cavalier treatment of his clients with the intention of furthering his own interests as detailed in Particulars 1, 2 and 3 the Tribunal also finds the Member guilty of charge 1.

## **PENALTY**

Pursuant to Rule 21.31 (a) of the Rules of the New Zealand Institute of Chartered Accountants the Disciplinary Tribunal orders that the name of **Stephen Naismith Fleming** be removed the Institute's register of members.

## **COSTS**

The Professional Conduct Committee seeks full costs of \$31,183.

The Tribunal's general approach is that the starting point is 100% of costs, noting that the Institute already bears the cost of abandoned investigations and costs up to the Professional Conduct Committee's decision to hold a Final Determination.

There are no mitigating factors such as excessive or unnecessary expenses incurred or demonstrated evidence of hardship (inability to pay).

Pursuant to Rule 21.33 of the Rules of the New Zealand Institute of Chartered Accountants the Disciplinary Tribunal orders that **Stephen Naismith Fleming** pay to the Institute the sum of \$31,183 in respect of the costs and expenses of the three hearings before the Disciplinary Tribunal, the investigation by the Professional Conduct Committee and the cost of publicity. No GST is payable.

## **PUBLICATION**

In accordance with Rule 21.35 of the Rules of the New Zealand Institute of Chartered Accountants the decision of the Disciplinary Tribunal shall be published on the Institute's website, in the *Chartered Accountants' Journal* and the *New Zealand Herald* with mention of the Member's name and locality.

## **RIGHT OF APPEAL**

Pursuant to Rule 21.41 of the Rules of the New Zealand Institute of Chartered Accountants which were in force at the time of the original notice of complaint, the Member may, not later than 14 days after the notification to the Member of this Tribunal's exercise of its powers, appeal in writing to the Appeals Council of the Institute against the decision.

While the Member remains entitled to appeal, the decision as to publicity shall not take effect.

No other decision shall take effect while the Member remains entitled to appeal, or while any such appeal by the Member awaits determination by the Appeals Council.



R J O Hoare  
**Chairman**  
**Disciplinary Tribunal**