IN THE COURT OF APPEAL OF NEW ZEALAND CA245/01

BETWEEN THE INSTITUTE OF CHARTERED ACCOUNTANTS OF NEW ZEALAND

Appellant

AND DAVID JOHN BEVAN

Respondent

Hearing: 5 June 2002

Coram: Keith J
McGrath J
Anderson J

Appearances: M P Reed QC and P A Morten for the Appellant
J Strauss for the Respondent

Judgment: 15 October 2002

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**JUDGMENT OF THE COURT DELIVERED BY KEITH J**

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**Disciplinary proceedings against an accountant**

[1] Mr Bevan, a member of the Institute of Chartered Accountants, was charged with misconduct in a professional capacity and breach of the Institute's Code of Ethics. The Disciplinary Tribunal of the Institute determined that the charges had been proved and imposed a penalty of suspension for twelve months, a fine of $2,000, a review by the Practice Review Board of his practice, attendance at a new practitioners' course, censure and costs of $4,422.80 plus GST. The Appeals Council dismissed Mr Bevan's appeal against both the finding and the penalty.

[2] The principal basis for the charges was Mr Bevan's 11 week delay in responding to a complaint made by one of his clients to the Institute and forwarded to him.

[3] Mr Bevan sought judicial review of the finding, including the penalty. Fisher J dismissed the application so far as it related to the finding but quashed the orders for suspension and for attending the new practitioners' course. In all other respects the penalties and ancillary orders were confirmed. While recognising the need for great caution before interfering with a penalty imposed by a professional disciplinary body, the Judge considered that there were both errors of principle and unreasonableness in the penalty imposed.

[4] The Institute appealed against the judgment in respect of penalty and Mr Bevan cross appealed in respect of his failure to obtain judicial review of the finding that the charges were established.

**The client's complaint is investigated**

[5] The complaint in issue was from a client, Mr Richard Wells, received by the Institute on 23 November 1999. Two days later the Secretary to the Institute's Professional Conduct Committee sent a copy of the letter to Mr Bevan and said:

> Now that the matter has been raised with the Institute, it will need to be considered by the Professional Conduct Committee.
>
> I should point out that it is the procedure of the Professional Conduct Committee to refer to the complainant, for comment, a copy of the

> reply to a complaint. Accordingly, you would need to ensure that your reply is in a form suitable for reference to Mr Wells.
>
> It is now the policy of the Committee to request a response within 14 days of receipt of this letter. However, it is obvious that Mr Wells is trying hard to sort out his tax affairs and it appears that there is more than a little confusion over the matter of fees paid and owing. In an effort to resolve the matter as quickly as possible would you please make your response an urgent priority.
>
> Please also be aware that the Professional Conduct Committee has the power to require a member to submit to the Fees Resolution Service and if directed by that Committee you may be charged with the cost of such an audit.
>
> I make this comment only in the interests of providing you with an opportunity to respond quickly.
>
> The Professional Conduct Committee meets next on 8 December and a reply before that would be much appreciated.

[6] On 13 December the Secretary wrote again referring to the earlier letter and saying that nothing had come to hand. The letter continued:

> Richard Wells has been ringing this office almost daily asking for your explanation, as apparently he urgently needs access to his records for purposes of creating a trust before his forthcoming marriage.
>
> The Professional Conduct Committee has become very concerned at the way in which some members have failed to respond in a timely way to complaints. The Committee resolved at its meeting last week to advise members that failure to reply without good reason would result in an application being made to the Disciplinary Tribunal for the suspension of the member in the public interest.
>
> I urge you to forward a response to the complaint by return mail.

[7] The Secretary left a telephone message for Mr Bevan on 20 December 1999. Mr Bevan did not reply, at least substantively. On 31 January 2000 the Professional Conduct Committee appointed a chartered accountant, Mr Copland, to carry out such investigations as may be necessary to determine why no explanation has been forthcoming. The letter to Mr Bevan said that Mr Copland "is empowered to obtain information and interview any parties that he considers may be appropriate". The letter continued:

> In my letter to you in December I did advise that failure to correspond with the Professional Conduct Committee may result in the Committee making an application for suspension of the member, in the public interest. Please note that the formal application papers have been prepared and a discussion will be held with the Chair of the Disciplinary Tribunal, Mr A N Frankham, as to process tomorrow 1 February 2000.
>
> The Committee trusts that you will cooperate fully with Mr Copland.

[8] The memorandum to the members of the Disciplinary Tribunal made it clear that the suspension contemplated by the Secretary was under the summary and temporary power conferred by the rules rather than the penalty available to the Disciplinary Tribunal once a charge was established.

[9] On 3 February, before the Disciplinary Tribunal held that preliminary telephone conference, Mr Copland met Mr Bevan and discussed the matter with him. In his report to the Institute on the meeting, Mr Copland recorded the following question and answer:

> Q1 Why has the Institute's correspondence not been replied to?
>
> A *Mr Bevan stated that he had advised the Institute by phone prior to Christmas that this was a complicated matter and it would take some time to respond. Mr Bartlett's letter to him advising of the complaint was dated November 25, 1999 and he was in the middle of his pre-Christmas rush. He had planned a vacation over the Christmas period and did not return to the office until January 17, 2000. Upon his return, they were rushing to compete GST returns due at the end of January and dealing with other pressing matters. He believes this client's complaint to lack specifics and was in general a waste of his valuable time.*
>
> …
>
> *He stated that he was getting sick and tired of regular complaints. He has had a number of them and believed that if a client queried a specified fee invoice he was happy to address that matter but a global fee query over a long period of time was a waste of time unless the client was prepared to pay for it.*
>
> *He advised that he had phoned Mr Wells and said that he was looking into his complaint but it was going to take some time for him to respond.*

[10] In his covering letter of 9 February to the Institute, Mr Copland said this:

> 3. I have spoken to Mr Richard Wells now on two occasions. The first time prior to receiving David Bevan's letter advising him that I was still awaiting his response and the second occasion today. I phoned him again today because I had contacted David Bevan advising that he had not enclosed with his response an analysis of the fee invoices he had raised since May/June 1997. Mr Bevan advised me that this was no longer necessary as he was well on the way to mending the relationship with Mr Wells. Although the complaint had not been withdrawn he was confident of a resolution as he offered to continue doing work for Mr Wells on the weekly instalment programme to bring him up to date with the Inland Revenue Department.
>
> 4. I phoned Mr Wells to confirm this, he stated that this had not been agreed and in fact he was more concerned than ever with the way that D J Bevan & Associates had acted as a result of his conversation today with Mr Stephen Swainston [who worked with Mr Bevan]. He now believed that he was in a worse position with the Inland Revenue Department than he previously understood. No appointment has been made to meet with Mr Swainston as yet, but he undertook to contact D J Bevan & Associates and set up a meeting as soon as possible in order that he could fully understand his current position. At this time he does not intend withdrawing his complaint.

[11] Mr Copland enclosed a copy of the letter of 8 February from Mr Bevan to the Institute replying in detail to Mr Wells' complaint. On the following day, 9 February, Mr Bevan also wrote a letter of apology to the Institute:

> I do write to apologise for the delay in replying to a recent case referred to the Professional Conduct Committee.
>
> I find a general difficulty in dealing with issues raised before the Professional Conduct Committee because the issues are not always clear from the correspondence received from the client.
>
> When Mr Copland visited me on Friday I showed him a draft report. We spent 15 man [hours] on Monday/Tuesday moving from that point to the final letter sent to Mr Copland by fax around 4.30pm yesterday.
>
> I still would have preferred to have had extra time to titivate the letter.
>
> …

[12] The Professional Conduct Committee met by phone on 15 February and its Secretary wrote to Mr Bevan in the following terms on 21 February:

> The Professional Conduct Committee met by telephone on 15th February 2000 and considered correspondence from you re the Wells complaint and a report from Mr Grant Copland.
>
> Attached is a copy of the minute of that teleconference meeting.
>
> Please note the matter of the complaint has been set down for final determination.
>
> A final determination hearing is a meeting to which you are invited to attend to answer certain particulars, which may warrant referral to the Disciplinary Tribunal.
>
> You may not be represented by counsel and you may make written submissions in advance of the hearing, which will be convened on Friday March 17th.
>
> Full details will be sent to you in due course.

[13] The enclosed minute recorded the resolution of the Committee in the following terms:

> It was resolved that as a result of the undue and unreasonable delay in response from DJB the matter be set down for final determination and that the member be required to attend a hearing on March 17th.

[14] The Secretary of the Professional Conduct Committee wrote to Mr Bevan again on 22 February listing the attempts he had made to solicit a response from Mr Bevan and on 29 February the Chair of the Committee wrote as follows about the final determination hearing of the Committee:

> Please find enclosed the particulars relating to the hearing in respect of the complaint from Richard Wells.
>
> …
>
> It is in your interest to attend the meeting, and please feel free to make any written submissions in advance of that date for consideration by the Professional Conduct Committee. …
>
> At this stage you are not entitled to be accompanied by legal counsel, however if the matter progresses to the Disciplinary Tribunal it is then that witnesses and legal counsel can be present.

[15] The enclosed particulars, as Fisher J said, is a curious document reading as follows:

> D J BEVAN
>
> In the circumstances where a complaint had been laid against you by Mr Richard Wells, and in circumstances where you were requested to provide a reply to the complaint to the Professional Conduct Committee:
>
> (a) you failed within a reasonable and proper time to reply to the Professional Conduct Committee;
>
> (b) by your said failure you have improperly frustrated the workings of the Professional Conduct Committee;
>
> (c) you have brought the Institute into disrepute.

[16] On 15 March Mr Bevan said that he could not afford the time to fly to Wellington and said that he would appreciate if the matter could be deferred until the next time the Committee met in Auckland. He acknowledged Mr Wells' reply and said that he should be able to write to the Committee before the following Friday. He in fact replied on the same day.

[17] The Professional Conduct Committee considered complaints from Richard Wells and others on 17 March. The minute of the meeting recorded a resolution resulting from the Committee's decision "to deal with all the matters together":

> It was resolved that
>
> With respect to the undue delay in providing any kind of response to the Wells complaint to the Committee, the matter be referred to the Disciplinary Tribunal.

The resolution also recorded other decisions concerning Mr Wells and other clients but those matters are not in issue before us.

**The Disciplinary Tribunal and Appeal Council give their rulings**

[18] On 7 August 2000 the Disciplinary Tribunal heard the following charge:

> That in terms of the Institute of Chartered Accountants Act 1996 and the Rules made thereunder and in particular Rule 21.30:

a. You have been guilty of misconduct in a professional capacity;

b. You have breached the Code of Ethics of the Institute in that:

There followed the particulars, stated by the Professional Conduct Committee, set out in para [15] above.

[19] It will be seen that the charge now has at its commencement the particular breaches with which Mr Bevan was to be charged before the Tribunal.

[20] Mr Bevan was not present at the Tribunal hearing, his wife having telephoned to say that he was not well, that he admitted the charges and that he pleaded extenuating circumstances. Counsel for the Professional Conduct Committee advised the Tribunal that he had received a character reference and a doctor's certificate. The hearing proceeded with the Tribunal treating the charge as denied. The Tribunal made the following finding:

> Our finding, after conducting the hearing, is that the particulars (a) and (b) have been proved.
>
> Particular (c), the finding is that the particular has been proved with regard to the complainant.
>
> And as regards to the charges, the Tribunal finds the member guilty of the charges (a) and (b), that he has been guilty of misconduct in his professional capacity and that he has breached the Code of Ethics of the Institute.
>
> The reasons for our decision include the following:
>
> The first is that in spite of numerous endeavours, including the appointment of an investigator on the part of the Professional Conduct Committee, and having regard to the apparent nature of the complaints laid against the member, the member failed to respond, and when he did offered no explanation to the requests for replies from the Professional Conduct Committee.
>
> The fact that it took 76 days from the date of notice of receipt of a complaint and request for comments, before the response was received, is a terrible factor the Tribunal has taken into account; also the fact that the member was invited on at least two occasions to appear before the Professional Conduct Committee and declined to do so.
>
> That is the finding of the Tribunal as to guilt.

(Mr Reed QC, who has been counsel for the Professional Conduct Committee throughout this matter, doubted that the Tribunal had used the expression "terrible factor" and thought that it was probably a mis-transcription.)

[21] The Tribunal then heard submissions from Mr Reed on penalty and had the assistance of its legal assessor. It imposed the penalty already indicated. It also decided in accordance with rule 21.35 to publish the decision in the *Chartered Accountants Journal*, the *Gazette* and the *New Zealand Herald*.

[22] The Appeal Council heard Mr Bevan's appeal on 13 October, Mr Bevan being represented by counsel on this occasion In its decision of 27 November, it recorded that the original complaint by Mr Wells had been withdrawn. It found no procedural error in the decision of the Tribunal and on the substance said this:

> Council determines that there is and was proper jurisdiction for the charges which were laid by the Professional Conduct Committee, such jurisdiction being found within the Rules of the Institute and further and notably the fundamental principles contained within the Code of Ethics in relation to the second charge and the first charge is properly predicated by the allegation that the failure to respond was professional misconduct. Under Rule 21.30(b)(1) Council accepts Mr Reed's submission that professional misconduct is something more than mere professional incompetence or deficiencies in the practice of the profession and that it includes a deliberate departure from accepted standards. The Appellant's failure to respond to the Professional Conduct Committee within a 76 day period is behaviour which is unacceptable to the profession and falls into the category of professional misconduct as it is a deliberate departure from accepted standards and portrays such indifference or an abuse of the privilege which accompanies the designation of Chartered Accountants. Council agrees with Mr Reed's submission that public confidence would be eroded and the disciplinary procedure likewise eroded should the Institute's members behave with the obvious indifference as the Appellant did in this case. Professional misconduct is therefore properly made out by the evidence against the Appellant.

[23] It was not persuaded that the penalties were improperly imposed or against the weight of evidence. Accordingly Mr Bevan's appeal to the Council failed. The Council gave the same directions about publication as the Tribunal had.

**The accountant applies for judicial review**

[24] On the application for judicial review, Fisher J held that the challenge to the substantive finding failed:

- Mr Bevan was in breach of his obligation under the Institute's rules to reply to the letters from the Institute.
- The non-compliance could properly be held to be professional misconduct and in breach of the Code of Ethics.
- There was no procedural irregularity.

[25] So far as the second point is concerned he said this:

> [34] When the matter went forward to the Disciplinary Tribunal a formal charge was laid stating that the offence was "misconduct in a professional capacity" and "breach of the Code of Ethics". It would have been better to allege a breach of the Rules in terms of R 21.30(e). Non-compliance with the Rules by failing to provide a timely response to a request for information must lie at the outer periphery of misconduct in a professional capacity and/or breach of the Code of Ethics. "Professional misconduct" and its variants are not met by mere professional incompetence or deficiencies in the practice of a profession. Something more is required such as a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse of the privileges which accompany the professional registration: *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197, 199 (CA of NSW). A code of ethics is usually concerned with matters of more substance than delay in replying to correspondence. However, both are undoubtedly elastic terms. For example, the Code of Ethics requires that "all professional obligations should be completed with due care and in a timely manner" (para FP 3) that members "refrain from any conduct which might bring discredit to the profession" (para FP 5) and that "no member shall do any act or make any omission in the course of performing professional duties that is likely to discredit that member" (para EP 13).

[26] On the challenge to the penalties he held however that there were both errors of principle and unreasonableness in the judicial review sense. The consequence was that the suspension was quashed along with the associated requirement that Mr Bevan attend a new practitioners' course before resuming practice.

**The legislation, the Institute rules and its Code of Ethics**

[27] One of the functions of the Institute under s5 of the Institute of Chartered Accountants of New Zealand Act 1996 is to promote, control and regulate the profession of accountancy by its members in New Zealand. Under s6(1) the Institute must have rules that provide, among other things, for

> (f) A Professional Conduct Committee to investigate complaints against members and former members of the Institute and the powers and procedure of that Committee; and
>
> (g) A Disciplinary Tribunal to hear complaints and matters referred to it by the Professional Conduct Committee and the powers and procedure of that Tribunal; and
>
> (h) An Appeals Council to hear appeals from decisions of the Disciplinary Tribunal and the powers and procedure of that Council; and
>
> (i) The kinds of conduct, including criminal offences, professional misconduct, and financial misconduct, for which a member or former member may be disciplined; and
>
> (j) The actions that may be taken in respect of, and the penalties that may be imposed on, a member or former member by the Professional Conduct Committee or a disciplinary body for such conduct.

[28] The Institute, under s7, must also always have a Code of Ethics prescribed by the Council that governs the professional conduct of its members. The importance which Parliament accords to these two powers is marked by s8 of the Act which says that the Regulations (Disallowance) Act 1989 applies to rules that relate to the matters referred to in s6(1)(f) to (j) and to the Code of Ethics.

[29] The Act regulates in some detail the disciplinary processes, requiring compliance with the principles of natural justice (s9), empowering the Tribunal to take evidence on oath (s10), empowering it, with the support of a warrant from the District Court, to summon witnesses and require the presentation of documents (s11), and conferring protection on members of the various disciplinary bodies (s12). Provisions to that effect are common in the statutes regulating professional and occupational registration and discipline. What is relatively unusual is however the lack of detail in this particular statute about the standards and rules to be applied and

the penalties that may be imposed if they are breached. Parliament has left these matters to the good judgment of the Institute, although subject to the possibility of scrutiny of the Institute's prescription of Rules and Code of Ethics by the Regulations Review Committee of the House of Representatives and of revocation by the House.

[30] The Institute rules relating to discipline concern the Professional Conduct Committee, the Disciplinary Tribunal and the Appeals Council. We consider the rules as they were in 1999 and 2000 when this matter was dealt with.

[31] Complaints to the Institute concerning a member are to be in writing and supported by any statutory declaration or additional information the Professional Conduct Committee may require (rule 21.2). Rules 21.3 to 21.9 regulate the procedures the Committee is to follow:

> 21.3 On receipt of a complaint, the Professional Conduct Committee shall investigate the complaint and make a determination and adopt one or more of the following courses of action:
>
> (a) Determine that no further action be taken.
>
> (b) Informally admonish the member, whether or not they have breached the Act, Rules and the Code of Ethics.
>
> (c) Require the member, subject to the agreement of the complainant, to submit any fee dispute to the Fees Resolution Service.
>
> (d) Set the matter down for final determination.
>
> 21.4 For the purposes of any investigation, the Professional Conduct Committee may:
>
> (a) make, or employ any person to make, such preliminary inquiries as it considers necessary; and
>
> (b) require any member or former member of the Institute or the New Zealand Society of Accountants to whom the investigation relates to provide the Committee or any person so employed any documents, things or information that are in the possession or under the control of that member or former member and that relate to the subject matter of the investigation; and
>
> (c) take copies of any documents that are provided to it.

21.5 Subject to these Rules, the Professional Conduct Committee shall regulate its procedures as it thinks fit.

21.6 At any time after receipt of a complaint, the Professional Conduct Committee may apply to the Disciplinary Tribunal for an order that the member concerned be suspended from the membership of the Institute until further order of the Disciplinary Tribunal.

21.7 Before the Professional Conduct Committee makes a final determination in respect of a complaint, it shall:

(a) Send to the member concerned copies of:

(i) the complaint;
(ii) any supporting statutory declaration;
(iii) any supporting additional information.

(b) Send a notice to the member concerned:

(i) setting out the reasons for the investigation;
(ii) inviting them within 14 days to respond in writing to the complaint;
(iii) advising them they have 14 days to notify the Committee if they wish to be heard.

21.8 Before making a final determination in respect of a complaint, the Professional Conduct Committee may explore with the complainant and the member the possibility of the complaint being referred to conciliation, mediation, arbitration or other dispute resolution process and referring it accordingly if the parties agree.

21.9 Where any complaint is referred to conciliation or mediation under Rule 21.8 and the parties fail to resolve the dispute, the Professional Conduct Committee shall make a final determination.

[32] A critical issue in this case is whether the Committee in its correspondence with Mr Bevan in November and December 1999 was invoking rule 21.4(b) or rule 21.7(b). Fisher J held that Mr Bevan was in breach of a valid requirement under rule 21.4(b). The letters from the Institute were not invitations under rule 21.7(b). The action of appointing Mr Copland appears to be in terms of rule 21.4(a) but nothing turns on that nor in the end on the summary powers of temporary suspension conferred by rule 21.6 and rule 21.20(a).

[33] Although the application of the latter provision was raised as a possibility (para [7] above) the suspension actually ordered was by the Tribunal under its disciplinary powers mentioned shortly. By contrast to the broad terms of rule 21.6, rule 21.20(a) provides for suspension if the Tribunal is satisfied that suspension is necessary or desirable having regard to the interests of the public or to the financial interest of any person.

[34] The charge against Mr Bevan came before the Tribunal because the Professional Conduct Committee acted under rule 21.10(d):

> 21.10 In making a final determination in respect of a complaint, the Professional Conduct Committee may adopt one of the following courses of action:
>
> (a) Determine that no further action should be taken.
>
> (b) Admonish the member and enter the details of the admonishment on the member's record held by the Institute.
>
> (c) When a complaint would otherwise warrant being referred to the Disciplinary Tribunal, with the written agreement of the member, make one or more of the following orders:
>
> (i) the member shall waive the whole or part of any fee agreed to or invoiced;
> (ii) the member shall return the whole or part of any fee already paid;
> (iii) appointing another member to undertake or complete work that the member had been engaged to perform;
> (iv) the member shall be reprimanded;
> (v) the member shall be severely reprimanded;
> (vi) the member shall pay to the Institute a sum as may be determined;
> (vii) the member shall pay costs to the complainant or the Institute.
>
> (d) Refer the matter to the Disciplinary Tribunal for hearing.

[35] The rules regulating the procedure of the Tribunal included the following:

> 21.24 Where the Professional Conduct Committee refers any matter to the Disciplinary Tribunal for hearing, the Tribunal shall give

the member concerned 14 days written notice of the hearing and of the charges.

…

21.26 Subject to these Rules, the Disciplinary Tribunal shall regulate its procedure as it thinks fit.

21.27 The Disciplinary Tribunal may appoint a legal assessor, who may be present at the hearing and may at any time advise the Tribunal on matters of law, procedure and evidence.

21.28 At every hearing before the Disciplinary Tribunal the Professional Conduct Committee shall be responsible for the presentation of the case against the member concerned.

21.29 The Disciplinary Tribunal may:

(a) Permit:

(i) a person to give evidence under oath administered by the chair of the Tribunal;
(ii) a person appearing as a witness before it to give evidence by tendering a written statement and verifying that statement by oath administered by the Chair of the Tribunal.

(b) Receive as evidence any statement, document, thing or information whether or not it would be admissible in a Court.

(c) Inspect and examine any documents, thing and information.

(d) Require that copies of any such documents or information be provided to any person appearing at the hearing.

(e) Impose any terms and conditions in respect of the provisions of copies of any document or information to a person appearing at the hearing and the use that may be made of them.

[36] The rules then set out the grounds for imposing disciplinary penalties:

21.30 The Disciplinary Tribunal may, after conducting a hearing, exercise one or more of the disciplinary powers set out in Rule 21.31 if the Disciplinary Tribunal finds:

(a) The member has been convicted of an offence punishable by imprisonment or a fine, and is of the

opinion that the conviction reflects on their fitness to practise accountancy, or tends to bring the profession into disrepute.

(b) The member is guilty of:

(i) misconduct in a professional capacity; or
(ii) conduct unbecoming an accountant.

(c) The member is guilty of negligence or incompetence in a professional capacity, and that this has been of such a degree or so frequent as to reflect on their fitness to practise as an accountant or tends to bring the profession into disrepute.

(d) The member has been adjudicated bankrupt or made a composition with their creditors within three years of the matter being referred to the Disciplinary Tribunal.

(e) The member has breached any of these Rules or the Institute's Code of Ethics.

(f) The member, being a Chartered Accountant in Public Practice, has engaged in any other business which is inconsistent with the integrity of a Chartered Accountant in Public Practice.

(g) In respect of a person who has had their name removed from the Institute's Register or has been suspended from membership of the Institute, the member has subsequently:

(i) knowingly entered into partnership with that person;
(ii) acted as an agent in carrying on that person's practice;
(iii) employed that person without the consent of the Disciplinary Tribunal.

(h) The member at any time has supplied any information to the Institute which is false or misleading.

(i) The member has failed to pay any sum due to the Institute by the date specified for payment.

(j) The member has failed to comply with any order made by the Professional Conduct Committee, the Disciplinary Tribunal or Appeals Council.

[37] It will be seen that the primary charge and finding in this case are at or near the top of that list, in subpara (b)(i). It will also be seen that no charge was made of

a breach of the rules in terms of para (e), a course which Fisher J would have preferred (para [25] above). Rather, the second charge was breach of the Code of Ethics.

[38] The main penalty imposed in this case is also near the top of the list of penalties as they were set out in rule 21.31:

> 21.31 Where the Disciplinary Tribunal finds a member guilty of a charge it may exercise one or more of the following powers:
>
> (a) Remove the member's name from the Institute's Register.
>
> (b) Suspend the member from membership of the Institute for any period not exceeding five years.
>
> (c) Impose a monetary penalty on the member not exceeding $5,000.
>
> (d) Cancel or suspend any Certificate of Public Practice held by the member.
>
> (e) Order the investigation of the member's practice by the Professional Conduct Committee.
>
> (f) Order regular reviews of the member's practice by the Practice Review Board who shall report their findings to the Professional Conduct Committee.
>
> (g) Order the member to complete any professional development course or that they engage an adviser or tutor, at the member's own expense.
>
> (h) Appoint another member to undertake or complete the work that the member has been engaged to perform.
>
> (i) Order the member to waive the whole or part of any fee agreed to or invoiced.
>
> (j) Order the member to return the whole or part of any fee already paid.
>
> (k) Censure the member.
>
> (l) Order that the member be prohibited from practising in partnership with a non-member.
>
> (m) Order the member to pay to the complainant such amount as the Disciplinary Tribunal thinks fit in respect of any costs or expenses incurred by the complainant in relation to the complaint or the matters which gave rise to it.

[39] The provisions of the Code of Ethics to which we were referred were Fundamental Principles 3 and 5 and Ethical Provision 13:

> **FP3 – Professional Competence, Due Care and Timeliness**
>
> Members have a duty to maintain a high standard of competence throughout their professional careers. They should only undertake work which they or their firm can expect to complete with professional competence. All professional obligations should be completed with due care and in a timely manner.
>
> **FP5 – Professional Behaviour**
>
> Members should conduct themselves in a manner consistent with the good reputation of the profession and refrain from any conduct which might bring discredit to the profession.
>
> **EP13 – Professional Conduct and Competence**
>
> No member shall do any act or make any omission in the course of performing professional duties that is likely to discredit that member or any other member or the Society, whether or not that act or omission is specifically referred to in any Ethical Provision of the *Code of Ethics*.

**Was Mr Bevan in breach of his obligation under Rule 21.4(b) to reply to the letters from the Institute?**

[40] The Judge distinguished between four phases in the procedure laid down in rules 21.1 to 21.10 : (1) the lodging of the complaint (Rules 21.1 and 21.2); (2) investigation of the complaint by the Professional Conduct Committee (Rules 21.3 and 21.4); (3) an opportunity for the member to respond to the complaint (Rule 21.7); and (4) a final determination by the Committee. We agree with that analysis and with his comment that rule 21.7 is driven by the natural justice requirements of s9 of the Act (para [29] above). "There is no breach of an obligation under R 21.7 if the member concerned decides not to avail himself of the opportunity to be heard in response to the complaint."

[41] Were the letters of 25 November 1999 and 13 December 1999 and the telephone reminder of 20 December to be categorised as a requirement to provide information or a mere notice to be heard? Fisher J gave the following reasons for deciding that a requirement under rule 21.4(b) was involved:

> [28] The choice is not made any easier by the Institute's use of the R 21.7 expressions "response" and "within 14 days" in its letters. And not surprisingly, the language in the initial letter is courteous ("request", "opportunity to respond quickly" and "a reply before that would be much appreciated"). However any doubt on that score was removed in the second letter. It referred to the concern of the Committee at the way in which some members had "failed to respond in a timely way" and that it had resolved "to advise members that failure to reply without good reason would result in an application being made to the Disciplinary Tribunal for the suspension of the member". That was scarcely notice of a mere opportunity. In terms of R 21.4(b), Mr Bevan must have known that it was a requirement.
>
> [29] The other element needed to bring the communications within R 21.4(b) was identification of the documents, things, or information, that Mr Bevan was to provide. At first blush the letters may seem open-ended, referring as they do to a mere "response". However, it must have been clear from the context that a reply confined to the statement "I deny the complaints" would not have satisfied the Committee. The first letter stated that "Mr Wells is trying hard to sort out his tax affairs and it appears that there is more than a little confusion over the matter of the fees paid and owing. In an effort to resolve the matter as quickly as possible would you please make your response an urgent priority". Expressions of that sort, and the letters as a whole, made it plain that the Committee required Mr Bevan to give his version of those facts alleged by Mr [Wells] in his letter of complaint. Mr Bevan was in no doubt that that is what the letters were calling for. That is what he provided in his letter of 8 February 2000. I conclude that the Institute letters amounted to a valid requirement to provide information under R 21.4(b).

[42] He also held that Mr Bevan had had reasonable time to respond and concluded that from 15 December 1999 Mr Bevan was in breach of a valid requirement under rule 21.4(b).

[43] With respect, we do not agree with the Judge's analysis of the correspondence. As he indicates, the first letter (para [5] above) uses expressions to be found in rule 21.7. We go further. Except in one respect **t**he letter is exactly what rule 21.7, backed by s9, contemplates. In it, the Committee sends a copy of the letter of complaint to Mr Bevan, it sets out the reasons for the investigation (if minimally), it invites him to respond within 14 days (while indicating a reason for an earlier response) and it says that a reply by the date of the next Committee meeting, 8 December (15 days later), would be much appreciated. The one respect in which the letter did not follow the requirements of rule 21.7 is that it did not advise Mr Bevan

that he had 14 days to notify the Committee if he wished to be heard (rule 21.7(b)(iii)). Not only does the initial letter fall within the terms of rule 21.7, it also does not state requirements in terms of rule 21.4(b). It does not "require" Mr Bevan to provide documents, things and information relating to the subject matter of the investigation, in his possession or under his control : first, the language of requirement is not used; and, second, documents, things and information in his possession or control – that is existing material – are not identified. Rather, Mr Bevan is being asked to respond to Mr Wells' complaint or, in the words of Fisher J, to give his version of the facts alleged by Mr Wells. The distinction in terms of the subject matter of the two rules is like that drawn in s11(3)(a) and (c) of the Act, between summoning a person to give evidence (para (a)) and to produce documents in their possession or control (para (c)). Here an explanation is being requested. Identified existing material is not being required.

[44] But does the letter of 13 December (para [6] above) make any difference? Is the Committee now requiring Mr Bevan to provide existing material in terms of rule 21.4(b)? We do not think so. That letter is about the failure to provide an explanation and the failure to respond in a timely way to the complaint. That is still the language and substance of rule 21.7. There is no requirement that certain existing material be provided. The reference to the possible application for (summary) suspension under rule 21.6 or rule 21.20(a) does of course indicate that the failure to respond is being viewed seriously but that possibility does not of itself transform the request under rule 21.7 to a requirement under rule 21.4(b). Those suspension powers (paras [31]-[33] above) are not tied to any requirement under any particular rule. We might also note that the particulars supporting the charge (para [15] above) are about frustrating the Committee's processes and (presumably as a result) bringing the Institute into disrepute. They do not use any of the wording or substance of rule 21.4(b). As an aside we note we are not suggesting that the Committee must invariably comply with rule 21.7 in its initial communications with a member concerning a complaint. Often a more informal initial communication may be considered more appropriate. But the Committee cannot proceed to make a final determination adverse to a member without having first complied in all respects with the Rule.

[45] We accordingly conclude that the Committee did not impose a requirement under rule 21.4(b). Mr Bevan was not in breach of an obligation under that particular rule – and no other rule was referred to.

[46] What is the consequence of that conclusion for the present proceedings? It does not follow from the conclusion that the course of action Mr Bevan followed could not properly be seen by those with responsibilities within the Institute as calling for disciplinary action. But were the charges laid by the Committee and held by the Tribunal and Council to be established properly available?

**Was there a proper basis for a finding of professional misconduct and breach of the Code of Ethics and for imposing the related penalties?**

[47] The High Court's role is that of judicial review. The Act does not provide for an appeal to a court. It is not for us to decide what finding we would have made were we the disciplinary body. The Tribunal, it will be recalled, held that particulars (a) and (b) were proved and that particular (c) was proved with regard to the complainant (paras [15] and [20] above). That is, it held that Mr Bevan had failed within a reasonable and proper time to reply to the Committee and as a result had improperly frustrated the Committee's work; and, in relation to Mr Wells, he had brought the Institute into disrepute. Its stated reasons turned on the initial failure to respond, the lack of explanations and the long delay before a response was provided. The Appeal Council in its brief and general reasons said that the jurisdiction for the charges was "found within the Rules of the Institute and further and notably the fundamental principles contained within the Code of Ethics in relation to the second charge and the first charge is properly predicated by the allegation that the failure to respond was professional misconduct" (para [22] above).

[48] That passage appears to indicate that the basis for upholding the finding of professional misconduct was a breach of the Rules, the only relevant Rule being rule 21.4(b). If that basis for the decision is removed, the finding of a breach of the Code of Ethics is not affected since it may be properly related to the ethical statements about timeliness and avoiding actions which are likely to discredit the profession or its members (para [39] above). But if no particular rule has been

breached – as we have held – and if the course of action which Mr Bevan followed properly supports only the finding of a breach of the Code of Ethics what is the basis for the further finding of professional misconduct?

[49] Under the Institute's Rules, findings of guilt, in this case of the serious charge of misconduct in a professional capacity as well as of breach of the Code of Ethics, were to be published, unless the Tribunal or Appeal Council otherwise directed, in the Institute's official publication and in any other publication the Tribunal or Appeal Court directed (rules 21.35 and 21.49). Further, unless otherwise directed, the hearings in both bodies were to be in public (rules 21.50-54). It will be recalled that the Tribunal and Council directed wide publication of their decisions relating to Mr Bevan (paras [21] and [23]).

[50] That publicity, especially of the finding of guilt on a serious charge, is in itself a substantial penalty given the likely serious impact of the finding on the practitioner's professional reputation and practice among other members of the profession and actual and potential clients. They would recognise that the charge on which Mr Bevan was found guilty was at or near the top of the list of contraventions a chartered accountant can commit in his professional practice. There is the associated likely consequence, realised in this case, of the imposing of a penalty at or near the top of the list available to the disciplinary bodies. Indeed the two matters of guilt and penalty cannot in practice be separated.

[51] We return to the facts of this case. Given that the only remaining basis for the finding of guilt of professional misconduct is Mr Bevan's failure to cooperate in a timely way with the Committee's process and in particular to respond promptly to Mr Wells' complaint, how are the finding of professional misconduct and the associated penalties to be seen? We recall the relative seriousness of the finding of professional misconduct and of the penalty of suspension in the lists of charges and of penalties in the scheme of the Institute's rules (paras [36]-[38]); they are also of course serious in absolute substantive terms. We take Mr Reed's point that suspension as a chartered accountant does not place the same bar on professional practice as in some other professions. But only chartered accountants can undertake

a wide range of statutory functions especially as auditors, and to repeat there is the reputational effect.

[52] In the Rules professional misconduct is coupled with conduct unbecoming an accountant and followed, apparently in a descending order of seriousness, by professional negligence or incompetence of a degree or frequency to reflect on fitness to practice or to tend to bring the profession into disrepute (para (c)) and breach of the Rules and Code of Ethics (para (e)). That ranking and the wording of the grounds themselves fully justify the opinion expressed by Fisher J that "professional misconduct" is not met by professional incompetence or deficiencies in the practice of the profession. More is required. And the failure to provide a timely response *in breach of the rules* must be at the outer limits (para [25] above). We have of course held that there is no breach of the rules; rather there is only a finding of a breach of the Code of Ethics.

[53] On that basis and given the limits on a court of review, how, to repeat, are the finding of professional misconduct and the associated penalties especially of suspension and attendance at the new practitioners' course to be seen? We consider that that finding and those penalties are, to quote Lord Denning MR, altogether excessive and out of proportion to the occasion; *R* v *Barnsley Council, ex parte Hook* [1976] 1 WLR 1052, 1057; see also Sir John Pennycuick at 1063 and Lord Denning's reference by way of *R v Northumberland Compensation Appeal Tribunal, ex parte Shaw* [1952] 1 KB 338, 350-351, to a seventeenth century case in which an excessive fine imposed by the Commissioners of Sewers was quashed on the ground that in law their fines ought to be reasonable.

[54] On that basis we quash the finding of professional misconduct and confirm the quashing (made on a different basis) of the penalties of suspension and attendance at the new practitioners' course. In all the circumstances and particularly in the interests of finality, we have decided not to exercise our power under s4(5) of the Judicature Amendment Act 1972 to refer the question of penalty back to the disciplinary bodies. Any publication of the decisions (paras [21] and [23] above) will be amended accordingly.

[55] We stress that this ruling is made in the particular context of a finding of guilt being made and associated penalties being imposed. We are not entering into the broader question, raised for instance by Lord Diplock as long ago as 1984, whether proportionality is a distinct head of review; *Council of Civil Service Unions* v *Minister for the Civil Service* [1985] AC 374, 410E. Rather, we limit ourselves to the penalty cases such as *Hook* and take comfort from commentary on proportionality which, while recording the controversy about its separate existence, singles out the penalty area as established; eg de Smith, Woolf and Jowell *Judicial Review of Administrative Action (*5th ed 1995) 601-602; P P Craig *Administrative Law* (4th ed 1999) 592-593 (noting the Bill of Rights provision about excessive fines and cruel and unusual punishment) and H W R Wade and C F Forsyth *Administrative Law* (8th ed 2000) 368 at notes 30-31.

[56] It follows that we have in effect dismissed the Institute's appeal against the quashing of the suspension. We have however done that without addressing its concern of principle. We now address that matter.

**Did the Tribunal and Council make a reviewable error in imposing the penalty of suspension?**

[57] We consider this question on the basis that Fisher J did, that is that Mr Bevan was guilty of both charges – of misconduct in a professional capacity and breach of the Code of Ethics. He began his discussion (under the head *Were the penalties legally unreasonable?*) with this paragraph:

> [41] The threshold for judicial interference with a penalty imposed by a disciplinary professional body is particularly high. Great weight is to be accorded to the expert opinions of professional disciplinary bodies – *Duncan v Medical Practitioners Disciplinary Committee* [1986] 1 NZLR 513 at 549; *Bolton v Law Society* [1994] 2 All ER 486 (CA), 490. It is not enough that in exercising its own discretion the Court might have imposed a very different penalty. There must have been an error of principle, improper treatment of relevant or irrelevant considerations, or a penalty that was obviously and demonstrably wrong.

He set out the penalties imposed and, referring to Mr Bevan's actions or lack of them in relation to the complaint, said that "the Institute was plainly justified in treating

Mr Bevan's conduct seriously" and that the considerations briefly listed supported a substantial penalty. The Judge then noted the relatively limited impact of suspension on an accountant and listed mitigating factors, concluding the list in this way:

> The question of penalty had to be approached on the basis that the original complaint from Mr Wells was unproven, as was the case with complaints from other clients. None of the complaints could be legitimately taken into account until admitted or proven. The sole matter before the Tribunal was the late reply to the Institute's inquiries.

[58] It would be hard at that point, said the Judge, to justify intervention. But "to those matters one must add several errors of principle":

> [46] … The first was that neither the Disciplinary Tribunal nor the Appeal Council distinguished between the need for deterrence on the one hand (justifying the imposition of punishment upon Mr Bevan to deter himself and others in the future) and the need to protect the public on the other (normally associated with suspensions and removals from the Institute's Register). I have no doubt that Mr Bevan's conduct called for a sharp penalty which would send a message to himself and others about the consequences of failing to cooperate with the Professional Conduct Committee. That undoubtedly justified all of the penalties imposed other than suspension and the ancillary orders relating to practice … .
>
> [47] Suspension, however, is in a different category. The primary concern of professional disciplinary proceedings is protection of the public, not punishment of the practitioner (*Wentworth v New South Wales Bar Association* (1992) 176 CLR 239 at 250-251). That is particularly important when it comes to suspensions, removals and de-registrations. As the full Court of the Federal Court (Australia) said in *Australian Securities Commission v Kippe & Anor* (1996) 137 ALR 423 at 431:
>
> > The immediate and direct legal effect intended by a banning order is not to impose a penalty or punishment on the person concerned, but to be preventive in that it removes a perceived threat to the public interest and the public confidence in the securities and futures industry by removing that person from participation therein.
>
> The same point was made in *Bolton v Law Society*, supra, at 492. The principal point of these orders is not punitive but protective of the public.
>
> [48] In this case the Disciplinary Tribunal and Appeals Council indicated in their stated reasons for penalty that they were primarily

> concerned with lack of cooperation in disciplinary procedures. They were understandably concerned to stamp out delays in responding to the information requirements of the Professional Conduct Committee. However the imposition of a penalty for that purpose is squarely a matter of deterrence, not protection of the public. Except in the most indirect of senses, it could not be argued that Mr Bevan's delay in replying showed that he had to be removed in order to protect the public. He was suspended from practice not because he would cause harm to others if he continued as a chartered accountant but because an example had to be made to encourage procedural compliance by others.

[59] The two other matters which the Judge considered as justifying review are particular to Mr Bevan's case – the Tribunal's evaluation of Mr Bevan's assumed failure to explain his delay and the fact that the Tribunal was told that Mr Bevan had sold his practice. In the circumstances we need take those matters no further, except to note that they tend to take the reviewing Court into a merits consideration of the penalties notwithstanding the strongly cautionary approach the Judge stated at the outset of this section of the judgment and repeated at the end of it.

[60] We begin with the matter of the approach to the review of penalties. In the *Bolton* case Sir Thomas Bingham MR recognised as authoritative this statement from a judgment of the Privy Council in *McCoan v General Medical Council* [1964] 1 WLR 1107, 1113:

> Their Lordships are of opinion that Lord Parker CJ may have gone too far in *Re a Solicitor* [1960] 2 QB 212, 221, when he said that the appellate court would never differ from sentence in cases of professional misconduct, but their Lordships agree with Lord Goddard CJ in *Re a Solicitor* [1956] 1 WLR 1312, 1314 when he said that it would require a very strong case to interfere with sentence in such a case, because the Disciplinary Committee are the best possible people for weighing the seriousness of the professional misconduct.

[61] That deferential approach was not challenged in the hearing before us, in particular by Mr Strauss, for Mr Bevan. The approach arises directly from the nature of the issues involved in the fixing of penalties and from the character of the disciplinary body that imposes them. There is a further factor supporting a deferential approach in the present case which is brought by way of an application for judicial review. *Bolton, McCoan* and the cases quoted are all appeals (and all but *McCoan* are appeals to Courts from bodies made up of lawyers). Greater deference

is to be expected in judicial review cases. (In the United Kingdom the difference may recently have become larger, given the wider view of its appellate powers of its appellate powers adopted by the Privy Council in hearing health professional discipline appeals in response to the European Convention on Human Rights; see eg *Ghosh* v *General Medical Council* [2001] 1 WLR 1915.)

[62] Mr Reed's central argument for the Institute is that its disciplinary bodies should be able to use the penalty of suspension to deter or to punish or both, even if there is no public interest element. In any event, in a case like the present, there is, he says, a public interest element because of the need to maintain a credible complaints procedure for the public.

[63] That argument is supported, it is said, by the silence of the Act and the Rules about the need to protect the public, except in one of the rules for interim suspension (para [33] above); next, by the fact that suspension does not have the serious consequence it does for a medical or legal practitioner; and by a challenge to the Judge's proposition that the primary concern of professional disciplinary proceedings is protection of the public and not punishment of the practitioner.

[64] That final challenge relates to the cases which the Judge cited, beginning with *Bolton*. In that case the Solicitor's Disciplinary Tribunal had suspended Mr Bolton, a solicitor, from his practice for two years. Mr Bolton appealed successfully to the Divisional Court but on the Law Society's appeal the penalty was restored by the Court of Appeal. We agree with Mr Reed that *Bolton* supports the proposition that suspension may have a punitive and deterrent purpose, contrary to the Judge's reading of the judgment (para [47] quoted in para [58] above). What Sir Thomas Bingham MR said was this:

> It is important that there should be full understanding of the reasons why the tribunal makes orders which might otherwise seem harsh. There is, in some of these orders, a punitive element: a penalty may be visited on a solicitor who has fallen below the standards required of his profession in order to punish him for what he has done and to deter any other solicitor tempted to behave in the same way. Those are traditional objects of punishment. But often the order is not punitive in intention. Particularly is this so where a criminal penalty has been imposed and satisfied. The solicitor has paid his debt to society. There

> is no need, and it would be unjust, to punish him again. In most cases the order of the tribunal will be primarily directed to one or other or both of two other purposes. One is to be sure that the offender does not have the opportunity to repeat the offence. This purpose is achieved for a limited period by an order of suspension; plainly it is hoped that experience of suspension will make the offender meticulous in his future compliance with the required standards. The purpose is achieved for a longer period, and quite possibly indefinitely, by an order of striking off. The second purpose is the most fundamental of all: to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth.

[65] The first of the two "other reasons" is not as significant in this case given that the accountant may still be able to carry on all or much of his practice during the period of suspension.

[66] It is true that Sir Thomas Bingham MR did go on to say that "orders made by the tribunal are not primarily punitive". But, as the quoted passage shows, they may be. The *Wentworth* case in the High Court of Australia was concerned with a procedural issue relating to the process for the admission of a practitioner and accordingly the comment about protection of the public, a comment which applies to *all* disciplinary processes, is not directly in point. In any event what the Judges said is that "the protection of the public [is] one of [disciplinary proceedings'] primary objects" ((1992) 176 CLR at 251). As with the *Bolton* case, they did not exclude punishment or deterrence. The *Kippe* case also does not support the view adopted by Fisher J. The question there was whether Mr Kippe could claim that answers he had given to questions asked by the Australian Securities Commission were not admissible because they might be used "in a proceeding for *the imposition of a penalty*". The proceeding in question was for a banning order prohibiting the person from carrying out certain investment tasks. The passage quoted from the judgment is about effect rather than purpose. That however may not be a significant difference in this case. What is significant is that the companies and securities legislation, according to the Federal Court's analysis, has at its core the protection of the public and in particular investors. In terms of the established distinction the provisions in question in that corporate area were protective rather than punitive (eg 137 ALR at 429-430). That legislation is also plainly different from that regulating a profession.

[67] We return to Mr Reed's argument based on the legislation and the Rules. They confer broad powers to make rules and to impose penalties. The powers are not unlimited (as indeed indicated in the ruling we make striking down the finding of professional misconduct and associated penalties). They are to be exercised in a measured way, not capriciously. But we do not see in the Acts and Rules any basis for the sharp distinction which the Judge draws between protective purposes and punitive purposes and then in respect of only some disciplinary processes and penalties.

[68] Finally, we agree with Mr Reed that in a case like the present the need to maintain public confidence in the Institute's disciplinary process means that the disciplinary bodies could well consider that a public interest element was present.

[69] We accordingly endorse the position adopted in *Bolton* and disagree with Fisher J's primary reason for quashing the suspension and new practitioners' course penalties. Given our earlier ruling about the professional misconduct charge that is of no practical consequence in this case.

**Result**

[70] Mr Bevan's cross appeal succeeds to the extent that the finding of misconduct in a professional capacity is quashed. The orders for the quashing of the penalties of suspension and attendance at the new practitioners course are confirmed, although on a different ground. The Institute's appeal fails, although its submissions on its appeal have largely succeeded.

[71] In the circumstances the respondent is entitled to an order for costs of $5,000 plus reasonable disbursements, including travel and accommodation costs of counsel, to be fixed by the Registrar if the parties cannot agree.

**Solicitors**
Harkness & Peterson, Wellington for the Appellant
Neumegen & Associates, Auckland for the Respondent