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

Hong Kong Institute of Certified Public Accountants takes disciplinary action against a certified public accountant

(HONG KONG, 30 July 2020) A Disciplinary Committee of the Hong Kong Institute of Certified Public Accountants ordered on 22 June 2020 that the name of Mr. Wong Tam Yee, a certified public accountant (A33301), be removed from the register of CPAs for two years with effect from 21 August 2020. In addition, Wong was ordered to pay costs of the disciplinary proceedings of HK$128,202.

Wong was the sole director and shareholder of a foreign private company ("Company"), which was holding shares of two Hong Kong listed companies ("Shares") with a market value of HK$146 million as at September 2013. The identity of the beneficial owners of the Company and the Shares was in dispute among Wong and certain other parties.

In September 2013, Wong caused the Company to sell the Shares to a number of individuals at a substantial discount to their market price. A cheque drawn by one of the buyers for HK$4 million was given to the Company as part of the purchase consideration, but Wong never cashed it. In the sold notes for the Shares submitted for stamp duty purposes, Wong falsely stated that the Shares were sold for full market value and that the consideration had been received.

Subsequently, a purported beneficial owner of the Company initiated legal proceedings against Wong and others (the buyers and transferees of the Shares) in relation to the disposal of the Shares. The Court found that Wong had been in breach of his fiduciary duties as a director when he caused the Company to sell the Shares at a substantially discounted price without first attempting to sell them in the open market, and there was no security for payment other than the HK$4 million deposit. The Court also found that Wong had in effect misappropriated the Shares, and had made a false and misleading statement in the sold notes. As a result, the Court ordered Wong and some of the others to pay substantial equitable compensation to the Company.

After considering the information available, the Institute lodged a complaint under sections 34(1)(a)(vi) and (viii) of the Professional Accountants Ordinance (Cap 50).

The Disciplinary Committee found that Wong was in breach of the fundamental principle of integrity under sections 100.5(a), 110.1 and 110.2(a) of the Code of Ethics for Professional Accountants, and the fundamental principle of professional behaviour under sections 100.5(e) and 150.1 of the Code of Ethics. In addition, the Committee found Wong was guilty of professional misconduct.

Having taken into account the circumstances of the case, the Disciplinary Committee made the above order under section 35(1) of the ordinance. The Committee noted that integrity and honesty are the cornerstones of the accountancy profession, but Wong had breached those fundamental principles in the dereliction of his duties as a director of the

Company. The Committee also noted that the Court's findings and Wong's blatant disregard for his fiduciary duties to the Company had damaged the reputation of the accountancy profession.

About HKICPA Disciplinary Process

The Hong Kong Institute of Certified Public Accountants ("HKICPA") enforces the highest professional and ethical standards in the accounting profession. Governed by the Professional Accountants Ordinance (Cap. 50) and the Disciplinary Committee Proceedings Rules, an independent Disciplinary Committee is convened to deal with a complaint referred by Council. If the charges against a member, member practice or registered student are proven, the Committee will make disciplinary orders setting out the sanctions it considers appropriate. Subject to any appeal by the respondent, the order and findings of the Disciplinary Committee will be published.

For more information, please see:
http://www.hkicpa.org.hk/en/standards-and-regulations/compliance/disciplinary/

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About HKICPA

The Hong Kong Institute of Certified Public Accountants ("HKICPA") is the statutory body established by the Professional Accountants Ordinance responsible for the professional training, development and regulation of certified public accountants in Hong Kong. The Institute has around 46,000 members and 19,000 registered students.

Our qualification programme assures the quality of entry into the profession, and we promulgate financial reporting, auditing and ethical standards that safeguard Hong Kong's leadership as an international financial centre.

The CPA designation is a top qualification recognised globally. The Institute is a member of and actively contributes to the work of the Global Accounting Alliance and International Federation of Accountants.

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Hong Kong Institute of
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香港會計師公會

香港會計師公會對一名會計師作出紀律處分

（香港，二零二零年七月三十日）香港會計師公會轄下一紀律委員會，於二零二零年六月二十二日命令將會計師王談意先生（會員編號：A33301）由二零二零年八月二十一日起從會計師名冊中除名，為期兩年。此外，王先生須繳付紀律程序費用 128,202 港元。

王先生曾是一間海外私人公司（「該公司」）的唯一董事及股東。該公司持有兩間香港上市公司的股份（「該等股份」），該等股份於二零一三年九月的市值為 1.46 億港元。王先生與若干第三方就該公司及該等股份的實益擁有人身份有所爭議。

於二零一三年九月，王先生促使該公司以較市價大幅折讓的價格出售該等股份給數名人士。其中一名買家向該公司發出了一張 400 萬港元的支票作為部分的交易代價，然而王先生從未兌現該支票。此外，在滙報印花稅所提交的售賣單據上，王先生虛假地聲稱該等股份是按市值出售及該公司已收到交易的代價。

其後，一名聲稱為該公司實益擁有人，就該等股份出售向王先生及其他人士（該等股份的買家與受轉讓人）提出法律訴訟。法庭裁定王先生沒有先在公開市場出售該等股份而反而以大幅折讓的價格出售該等股票，以及除了該 400 萬港元訂金外沒有獲取任何付款保證的做法，違反了他作為董事的受信責任。法庭同時裁定王先生實際上挪用該等股份，並在售賣單據上作出虛假及具誤導性的陳述。最後，法庭裁定王先生與部分其他人士須向該公司支付巨額的衡平賠償。

公會考慮所得資料後，根據香港法例第 50 章《專業會計師條例》第 34(1)(a)(vi)及(viii)條作出投訴。

紀律委員會裁定王先生違反了 Code of Ethics for Professional Accountants（「Code of Ethics」）第 100.5(a)、110.1 及 110.2(a)條有關「Integrity」的基本原則，以及 Code of Ethics 第 100.5(e) 及 150.1 條有關「Professional Behaviour」的基本原則。委員會亦裁定王先生犯有專業上的失當行為。

經考慮有關情況後，紀律委員會根據《專業會計師條例》第 35(1)條向王先生作出上述命令。委員會認為持正誠信是會計專業的基石，但王先生違反該等基本原則未盡作為該公司董事的職責。委員會同時注意到法庭的判決及王先生公然無視其對該公司的受信責任，損害了會計專業的聲譽。

<u>香港會計師公會的紀律處分程序</u>

香港會計師公會致力維持會計界的最高專業和道德標準。公會根據香港法例第 50 章《專業會計師條例》及紀律委員會訴訟程序規則，成立獨立的紀律委員會，處理理事會轉介的

投訴個案。委員會一旦證明對公會會員、執業會計師事務所會員或註冊學生的檢控屬實，將會作出適當懲處。若答辯人未有提出上訴，紀律委員會的裁判將會向外公佈。

詳情請參閱：
http://www.hkicpa.org.hk/en/standards-and-regulations/compliance/disciplinary/

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關於香港會計師公會

香港會計師公會是根據《專業會計師條例》成立的法定機構，負責培訓、發展和監管本港的會計專業。公會會員約 46,000 名，學生人數逾 19,000。

公會開辦專業資格課程，確保會計師的入職質素，同時頒佈財務報告、審計及專業操守的準則，以鞏固香港作為國際金融中心的領導地位。

CPA 會計師是一個獲國際認可的頂尖專業資格。公會是全球會計聯盟及國際會計師聯合會的成員之一，積極推動國際專業發展。

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Proceedings No. D-14-0982-C

IN THE MATTER OF

A Complaint made under section 34(1A) of the Professional Accountants Ordinance (Cap. 50)

BETWEEN

The Registrar of the Hong Kong Institute of Certified Public Accountants — Complainant

AND

WONG TAM YEE (A33301) — Respondent

Disciplinary Committee:

Mr. WONG Tim Wai (Chairman)
Ms. CHAN Wai Kam, Caroline
Ms. CHUI Hoi Yee
Mr. CHOW Dennis Chi In
Mr. NG Chi Keung, Victor

Date of Hearing: 12th July 2019

Date of Decision: 16th December 2019

DECISION

1. This is a complaint made by the Registrar of the Hong Kong Institute of Certified Public Accountants as the Complainant against the Respondent pursuant to Section 34(1A) of the Professional Accountants Ordinance Cap. 50 ("PAO") in relation to the breach of fiduciary duties and/or failure to observe, maintain or otherwise apply the fundamental principle of integrity as the director of Excel Courage Holdings Limited ("Excel") in respect of the disposal of certain shares on or about 25th September 2013.

Background

2. The Respondent is a certified public accountant. When he became the sole director of Excel and the registered shareholder of the shares in Excel on about 21st February 2011, he executed an undated declaration of trust which left the identity of the beneficiary blank; a blank undated share transfer form; and an undated letter of resignation as director ("the Blank Excel Forms"). The reason for executing the Blank Excel Forms is in dispute.

3. Excel is a company incorporated in the BVI. From May 2012 onwards, it began to acquire shares in Luxey International (Holdings) Limited (stock code: 8041) ("Luxey") and China Railsmedia Corporation Limited (stock code: 745) ("Railsmedia"). The total shares in question are 974,180,000 shares in Luxey and 147 million shares in Railsmedia (collectively "the Shares"). At all the material times, Excel has been the registered owner of the Shares. From May 2012, Excel started to acquire the shares in Luxey and Railsmedia and held them in a brokerage account with Fulbright Securities Limited ("Fulbright").

4. On 5th September 2013, Sun Xiao Xiang ("Sun") opened a brokerage account at CLC Securities Limited ("CLC"). On 24th September 2013, the Respondent caused Excel to open a brokerage account at CLC. On the same date, Tsang Man Ho Alvin ("Alvin"), Wong Tsz Kin ("Wong") and Tsang Wing Ho Ringo ("Ringo") opened a brokerage account at CLC. On 25th September 2013, the Respondent caused Excel to transfer all of the Shares from Excel's securities account with Fulbright to Excel's securities account with CLC; and then from Excel's securities account with CLC to the CLC securities accounts in the names of Sun, Alvin, Wong and Ringo. It is claimed that the disposal of the Shares owned by Excel was effected pursuant to an alleged agreement between the Respondent and one of Sun, Alvin, Wong and Ringo at the price of 40% of the closing price on the day immediately before, with a payment of HK$4 million as deposit.

5. In respect of the transfer to Sun, Alvin, Wong and Ringo, there were bought and sold notes bearing the date 25th September 2013 and stating the subscription price as HK$0.08 ("the Sold Notes"). The opening market price on 25 September 2013 was HK$0.08.

6. As of 25th September 2013, the market value of the Shares was HK$146,043,880. Yet, Sun, Alvin, Wong and Ringo had not made payment for the Shares except providing the Respondent a cheque payable in the amount of HK$4 million to Excel by Sun. The cheque payable has not been banked but remains in the possession of the Respondent. Therefore, neither Excel and/or Hung Ka Leung ("Hung") has received payment for the Shares. The Shares were partly sold by Sun, Alvin, Wong and Ringo from 25th September 2013 to 27th September 2013.

7. On 25th September 2013, Hung completed Blank Excel Forms so that he became the sole registered shareholder and director of Excel and the Respondent ceased to be the director.

8. Hung obtained an ex parte Mareva injunction against the Respondent on 26th September 2013. Moreover, Hung obtained an ex parte Mareva injunction against Sun, Alvin, Wong and Ringo on 3rd October 2013, restraining them from dealing with the proceeds of the Shares, and restraining Ringo from dealing with Railsmedia's shares held in his CLC account. The proceeds of sale of the Shares by Sun, Alvin and Ringo, and the unsold Shares held in the name of Ringo, have been paid into court.

9. A trial was held on 22nd, 26th – 30th October, 2nd, 3rd and 5th November 2015 ("the Trial") and Deputy High Court Judge R Ismail SC ("the Court") ruled in the Judgment under HCCL 34/2013 on 26th February 2016 ("the Judgment") that the Respondent was in breach of his fiduciary duty as director when he disposed of the Shares. Although he has apparently not gained from his breach of duty, Excel has nonetheless suffered a loss. Excel is entitled to the return of the Shares and the proceeds secured by Mareva injunctions and/or paid into court. The Court further ordered that the Respondent, Sun and Ringo be jointly and severally liable to pay equitable compensation of HK$283,780,800 and costs of the action under the Judgment to Excel.

The Complaints

10. There are altogether 3 complaints, as listed below:

    (1) 1st Complaint: the Respondent failed to comply with the relevant laws and regulations and failed to avoid any action that discredits the profession, in breach of sections 100.5(e) and 150.1 of the Code of Ethics for Professional

Accountants ("COE"), when he was found to have breached his fiduciary duties as a director in disposing of the Shares;

(2) 2nd Complaint: the Respondent was in breach of the fundamental principle of integrity under sections100.5(a), 110.1 and 110.2(a) of the COE, as his breach of fiduciary duties above was dishonest, and he made false statements in the Sold Notes to the Shares that the sales were for full market value and that consideration had been received, when the same was not true.

(3) 3rd Complaint: the Respondent was guilty of professional misconduct under section 34(1)(a)(viii) of the PAO, by reason of his conduct under the 1st and 2nd Complaints above.

Law and Principles

11. The complaints were made under section 34(1)(a)(vi) and 34(1)(a)(viii) of the PAO alleging that the Respondent failed to observe, maintain or otherwise apply the relevant and applicable professional standards and has been guilty of professional misconduct.

12. The complaints refer to various statutory requirements and applicable professional standards. The relevant laws and principles will be referred to in the course of the following reasons; but the major ones are set out at this outset hereinbelow.

Statutory Provisions

13. Section 34(1)(a)(vi) of the PAO stipulates that a complaint may be made against any certified public accountant for having failed or neglected to observe, maintain or otherwise apply a professional standard.

14. Section 34(1)(a)(viii) of the PAO stipulates that a complaint may be made against any certified public accountant for having been guilty of professional misconduct.

15. Section 100.5 of the COE provides that: "A professional accountant shall comply with the following fundamental principles: (a) Integrity – to be straightforward and honest in all professional and business relationships; ... (e) Professional

Behavior – to comply with relevant laws and regulations and avoid any action that discredits the profession."

16. Section 110.1 of the COE provides that: "The principle of integrity imposes an obligation on all professional accountants to be straightforward and honest in all professional and business relationships. Integrity also implies fair dealing and truthfulness."

17. Section 110.2 of the COE provides that: "A professional accountant shall not knowingly be associated with reports, returns, communications or other information where the professional accountant believes that the information: (a) Contains a materially false or misleading statement; ..."

18. Section 150.1 of the COE provides that: "The principle of professional behavior imposes an obligation on all professional accountants to comply with relevant laws and regulations and avoid any action that the professional accountant knows or should know may discredit the profession. This includes actions that a reasonable and informed third party, weighing all the specific facts and circumstances available to the professional accountant at that time, would be likely to conclude adversely affects the good reputation of the profession."

Burden and Standard of Proof

19. In relation to the legal principles, the Respondent refers to the case of *Hollington v F. Hewthorn & Co.* [1943] KB 587 for the general principle that judgments in other proceedings are not admissible evidence.

20. However, the subsequent House of Lords' decision in *GMC v Sparkman* [1943] AC 627 ruled that a civil judgment could constitute *prima facie* proof in disciplinary proceedings. It was also ruled that a civil judgment constitutes a "strong prima facie case which throws a heavy burden on [a respondent] who seeks to deny [it]".

21. The Respondent further submitted that the Judgment alone is insufficient to find him guilty under the requisite standard of proof as disciplinary proceedings require a higher burden of proof.

22. However, the Court of Final Appeal held in *Solicitor v Law Society of Hong Kong* FACV 24/2007 that the standard of proof in disciplinary proceedings is the civil standard and civil standard alone.

23. Furthermore, in the subsequent Court of Appeal's judgment in *Chan Kin Hang Danvil* CACV 246/12, it was held that "…. the notion, as advocated by Mr Grossman, that in disciplinary proceedings there exists a heightened civil standard of proof which suggests that the standard of proof may vary with the gravity of the misconduct alleged or the seriousness of the consequences for the person complained of, must be firmly rejected. The standard of proof is the civil standard and civil standard alone. The approach to its proper application is that as explained by Bokhary PJ in *Solicitor (24/07) v Law Society of Hong Kong.*"

1st Complaint

24. The 1st Complaint concerns the Respondent's breach of the relevant laws and regulations in disposing of the Shares, namely the common law rules and statutory provisions concerning the fiduciary duties owed by a director. As such the 1st Complaint relates to the Respondent's breach of section 100.5(e) and 150.1 of the COE for failing to comply with the rules on directors' duties.

The Respondent's Case

25. The Respondent's main submission is that what the Respondent did in selling the Shares on 25th September 2013 was according to the instructions of the owner of the Shares. As such, the Respondent argued that the Judgment was wrong on the basis that there was no determination of who the beneficial owner(s) of the Shares was/were.

26. In essence, the Respondent's case was mainly that the Respondent needed to act upon the directions of the true owner(s) of the Shares and hence "is also accountable to the shareholder"; therefore, without determining the identity of the beneficial owner, the Court's finding that the Respondent breached his fiduciary duties was wrong.

27. The Respondent's second argument is that the decision to sell the Shares was a "commercial decision" and therefore was beyond the reproach of the Court. The Respondent's version is that the Court's decision was mainly based on the Court's comment that there was no commercial reason for the sale but it is not for the Court to decide on subjective commercial decisions.

Discussion and Decision of the 1st Complaint

28. In relation to the submission that the Court did not determine the identity of the beneficial owner, the Committee considers that it is trite law that directors are required to act "bona fide in what they consider…is in the best interests of the company" (see *Re Smith & Fawcett* Ltd [1942] Ch 304 at 306 CA). This is a core duty which applies to every decision which directors make. Furthermore, a director is not accountable to a specific shareholder; on the contrary, a director owes fiduciary duties to the company to act in its best interests (see *Halsbury's Laws of Hong Kong,* Vol 95 §95.0666).

29. As a starting point, the Respondent's submission would be contradictory to the Court's finding that Excel was the beneficial owner of the Shares at Paragraph 152 of the Judgment.

30. A company is a separate legal entity and beneficial ownership follows the legal ownership. In the premises, this would mean that the Shares were owned by Excel.

31. Furthermore, at Paragraph 134 of the Judgment the Court stated that "I agree with [the Respondent] that I do not need to decide for present purposes who, if not Mr. Hung, was the beneficial owner of Excel at the material times". This shows that it was the Respondent's own submission at Trial that the Court need not determine the beneficial owner of Excel.

32. Even if the Respondent's case is that the Court did not determine the true beneficial owner of Excel, the absence of such finding does not affect the conclusion that the Respondent breached his fiduciary duties owed to Excel. This is because during the Trial, it was *not* the Respondent's case that an anonymous third party owned the Shares and he disposed of the Shares in accordance with the instructions of the anonymous third party; rather, the Respondent's case at Trial was that he himself was the part-owner of the Shares and he himself made the decision to sell the Shares.

33. In any event, in Paragraphs 128 - 132 of the Judgment, the Court rejected the Respondent's case that he had paid for the Shares and was part owner with Lau Chi Yuen Joseph ("Lau"). There was no basis for the Respondent to suggest that the true beneficial owner was an anonymous third party. No evidence of the same was adduced at Trial to support the Respondent's case. As such, the

Committee is of the view that the Respondent is merely hiding behind a hypothetical statement devoid of evidence.

34. Moreover, even if the Respondent had put forward relevant evidence that an anonymous third party was the beneficial owner of the Shares, this argument would be rejected by the Committee in any event. This is because such argument would lack credibility as it is radically different from what the Respondent had put forward during the Trial.

35. In light of the above, the Committee rejected that the Respondent's first argument that the Judgment was wrong because there was no determination of the beneficial owner of the Shares.

36. In relation to the Respondent's second argument that commercial decisions are beyond the reproach of the Court, the Committee considers that the reference to Paragraph 166(e) of the Judgment with regard to commercial decisions was taken out of context. In Paragraph 166(e) of the Judgment, the Court stated that "there appears to be no good commercial reason for 'selling' the Shares on the terms of the alleged Excel-Sun Share SPA". In that sentence, the Court was not commenting on the *sale* itself, but was commenting on whether there were commercial reasons for the *terms* of the sale.

37. The Committee is of the view that this version is apparent because the Court rejected at Paragraphs 155 – 165 of the Judgment all 4 commercial reasons for selling the Shares given by the Respondent.

38. It is obvious that the Court was addressing the terms of the agreement such as timing and value for consideration. Paragraph 166(e) of the Judgment was a comment that there were no good commercial reasons for those particular *terms*, i.e. consideration fixed at 40% of the closing price and HK$4 million deposit forwith, which were substantially disadvantageous to Excel.

39. As such, it is the Committee's view that the Respondent's interpretation stating that there were no good commercial reasons for the *sale* itself was a misinterpretation of the Judgment.

40. In the premises, as Paragraph 166(e) of the Judgment concerned the *terms* of the sale, and not the *sale* itself, it seems to us that this argument was premised on the wrong assumption that it is not for the Court to judge commercial decisions. Firstly, it is trite that

directors owe a fiduciary duty to the company and as such, it is for the courts to uphold and enforce the standards. Secondly, although decisions made by directors inevitably involve a degree of commercial decision-making, this does not mean that there is no objective standard for the Court to judge a director's decision. Thirdly, the Respondent's logic that the duties owed by a director would never be enforceable because their commercial decisions are not for the Court to judge is clearly untenable given the legal ramificiations in place for breach of directors' duties and the existence of the precedent of courts enforcing laws on the breach of directors' duties.

41. In conclusion, as the director of Excel in a fiduciary relationship with the company, the Respondent was required to act honestly, in good faith and in the best interests of Excel. Despite being the registered shareholder of the Shares in Excel, and the sole director of Excel between 21st February 2011 and 25th September 2013, even relying on the Respondent's own case, the Respondent at all material times held part of the Shares in Excel for the benefit of another person.

42. Notably, the Respondent's own case is that the Respondent was beneficial owner of only 50% of the Shares, and he disposed of 100% of the Shares on 25th September 2013 without any prior consent from the other alleged beneficial owner. There was no suggestion that the financial position of Excel was materially different on 25th September 2013 yet the Shares were sold in one day.

43. Moreover, the Respondent did not act in the interests of Excel in disposing of the Shares. The Respondent sold the Shares at a 60% discount of the market price without first attempting to sell the Shares in the market; and no good reason was advanced for this.

44. In addition, the Respondent sold the Shares to Sun, a non-Hong Kong resident previously unknown to the Respondent or Excel, who was apparently introduced through a bank manager in mainland China. The terms of the sale were to be completed 7 days later and there was no security for the payment other than a deposit of HK$4 million.

45. In light of the above, the Committee holds that the Respondent was in breach of sections 100.5(e) and 150.1 of the COE for his failure to comply with relevant laws, i.e. the Respondent breached his fiduciary duties to Excel under common law. This is because,

as stated by the Court in the Judgment, the Respondent did not act in the best interests of Excel when disposing of the Shares. It is untenable that the Respondent would consider that it was in Excel's best interests to sell the Shares at a 60% discount without first selling the Shares on the market. It is unbelievable that the Respondent would consider it to be in Excel's best interests to execute the sale without any security other than a deposit for HK$4 million as held in Paragraph 167(a) to (c) of the Judgment.

2nd Complaint

46. The 2nd Complaint relates to the Respondent's breach of the fundamental principle of integrity as his breach of fiduciary duties above was dishonest, and he made false statements in the Sold Notes to the Shares that the sales were for full market value and that consideration had been received, when the same was not true.

The Respondent's Case

47. The Respondent's main submission is that the Court did not find the Respondent to have acted dishonestly, and that on the contrary, the Court found that the Respondent did not gain from the breach of duty.

48. The Respondent also submitted that there was no breach of integrity regarding the Sold Notes. The Respondent's submission is twofold. Firstly, the Sold Notes must bear the closing prices for stamp duty purposes but the consideration received at a discounted price was a separate matter. Secondly, the statement would only be false if the consideration stated on the sold note was less than the consideraton received as this would result in the defrauding of stamp duty.

Discussion and Decision of the 2nd Complaint

49. In relation to the submission that the Court did not find the Respondent to have acted dishonestly, the Court held at Paragraph 47 of the Judgment that although the pleadings do not expressly mention dishonesty, it was clear to the Court from reading the pleadings as a whole that dishonesty of the Respondent was alleged, and in particular, the Respondent's theft of the Shares.

50. Further, the Court considered that the allegation against the Respondent was characterized as "theft of shares" in Paragraphs 47 and 50 of the Judgment and as misappropriation in Paragraphs

53 and 54 of the Judgment. The Committee is of the view that theft and misappropriation of the Shares clearly amount to dishonesty as dishonesty is one of the elements in order to commit the offences of theft and misappropriation.

51. Furthermore, the Court found that two other defendants, namely the 2nd and 5th Defendants, had dishonestly assisted the Respondent in his breach of fiduciary duties. If the Court found the accessories, i.e. the 2nd and 5th Defendants to have acted dishonestly, it defies common sense and logic that the main defendant, i.e. the Respondent, was not found to have acted dishonestly.

52. Moreover, the Committee considers that there was dishonesty on the part of the Respondent given that an honest person would not participate in a transaction if he knows it involves a misapplication of trust assets to the detriment of the beneficiairies. An honest person would not deliberately turn a blind eye and proceed with the transaction either as held in Paragraph 171(b) of the Judgment.

53. The second argument advanced by the Respondent is that there was no breach of integrity with regard to the Sold Notes. The Respondent's argument is that there would only be a breach of integrity if it involved the defrauding of stamp duty. In other words, the Respondent's version is that there would only be falsity if it involved understating the consideration but there would not be falsity in overstating the consideration and paying more stamp duty.

54. The Committee is of the view that there was a false statement regardless of whether the consideration was more or less than the actual amount. The Committee considers that the fact that the Respondent has not defrauded in relation to stamp duty is irrelevant regarding the purpose of the 2nd Complaint. This is because he is not accused of defrauding stamp duty. The Committee is of the opinion that the Respondent's argument confuses two matters, namely the terms of the contract for sale and the payment of stamp duty. The Sold Notes should reflect the actual price for the sale of Shares, which in this case would be 40% of the closing price.

55. The Court took the same view as in Paragraph 167(d) of the Judgment that the statement under the Sold Notes was false and misleading. The Court took the view that the Respondent signed the Sold Notes on the false basis that the sale was for full market

value and on the basis that consideration had been received, when in reality, neither were true.

56. Given the above, the Committee is of the opinion that the Respondent's arguments that there was no breach of integrity is baseless and untenable.

57. In the premises, the Committee holds that the Respondent breached the principle of integrity under sections 100.5(a), 110.1 and 110.2(a) of the COE on the basis that the Respondent acted dishonestly as he breached fiduciary duties as stated hereinabove and caused Excel to knowingly mislead the Inland Revenue Department by signing the Sold Notes on a false basis, and by knowingly participating in a transaction which involved the misapplication of trust assets to the detriment of the beneficiaries.

3rd Complaint

58. The 3rd Complaint relates to whether the Respondent has been guilty of professional misconduct under Section 34(1)(a)(viii) of the PAO with reference to the 1st and 2nd Complaints.

59. It is unnecessary to repeat the details of the 1st and 2nd Complaints here.

The Respondent's Case

60. The Respondent denies the 3rd Complaint and the Respondent's case mainly is that there was no professional misconduct because the acts in dispute were not conducted in his capacity as an accountant. The Respondent stated that he was disposing of the Shares as he "thought right".

61. Further, the Respondent argued that even if he made the wrong decision in selling the Shares, there was no professional misconduct on the basis that, according to the Respondent's version, the Court made no finding that the Respondent was in breach of his professional conduct. The Respondent also stated that the Court made no adverse comment regarding the Respondent as an accountant; it is the Respondent's version that he has done nothing to discredit the profession.

62. Moreover, the Respondent argued that if the present situation constituted professional misconduct, this would cause a chilling effect where "all accountants will be slow in taking up the role as

director because breach of a director's duty even without finding of fraud; dishonesty or other misconduct can be used as proof of breach of professional misconduct."

Discussion and Decision of the 3rd Complaint

63. The starting point is that the term "professional misconduct" has a wide meaning. It encompasses conduct, acts or omissions which fall below the standards expected of members of the profession (see *Law Yiu Wai, Ray v The Medical Council of HK* HCAL 46/2015).

64. The principles in the COE cover both professional accountants in public practice and professional accountants in business. The definition of professional accountants in business under the COE is "A professional accountant employed or engaged in an executive or non-executive capacity in such areas as commerce, industry, service, the public sector, education, the not for profit sector, regulatory bodies or professional bodies, or a professional accountant contracted by such entities". Given the definition hereinabove, the Committee is of the view that the definition of professional accountants in business covers the activities of the Respondent as director and shareholder of Excel.

65. Although the Court does not mention professional misconduct committed by the Respondent in the Judgment, the issue of professional misconduct is a matter for the Committee to decide as opposed to the Court.

66. The Committee considers that the Respondent's argument regarding the potential chilling effect the case would have on accountants taking up a director's role is groundless and does not advance his case. The Committee opines that this factor is not relevant in deciding whether the Respondent has failed or neglgected to comply with the relevant professional standards.

67. The Committee is of the view that integrity and honesty are cornerstones of the accountancy profession. The Committee is of the opinion that the Respondent was in dereliction of his duties by breaching the fundamental principles of integrity and honesty as stated hereinabove. The Committee is also of the view that the Court's findings and the Respondent's blatant disregard for his fiduciary duties have no doubt damaged the reputation of the accountancy profession. Accordingly, the Committee holds that the Respondent was guilty of professional misconduct under

section 34(1)(a)(viii) of the PAO, by reason of his conduct under the 1st and 2nd Complaints above.

Further Comments

68. In light of the written submissions made by both parties before the trial and the oral submissions made by the Complainant during the trial (the Respondent was given proper and due notice for the trial and yet did not turn up), it is impossible for the Committee to exhaustively set out every point raised and all evidence referred to.

69. The essential arguments and submissions have been set out in this Decision which the Committee considers sufficient for the Complaints to be resolved. In the circumstances, the Committee does not recite all the points of submission made by the parties. However, the Committee wishes to make clear that it has considered all of the said submissions and all relevant evidence presented in the present case before making the Decision herein.

70. Furthermore, in the course of the trial, points were taken as to the scope of the Complaints. After due consideration, the Committee finds that the allegations made by the Complainant and the evidence presented in proof fall within the ambit of the Complaints and there is nothing which would have taken the Respondent and his legal team by surprise. The Respondent was able to and thoroughly dealt with the said allegations in his defence. In any event, there is no prejudice to the Respondent.

Conclusion

71. In light of the reasons above, the Committee concludes that all 3 complaints are established against the Respondent.

Orders and Directions

72. The Committee makes the following orders and directions,

(1) All the 3 Complaints are proved against the Respondent;

(2) The Complainant shall file and serve a written submission on sanctions and application for costs together with a statement of costs, if any, within 14 days of the service of this Decision;

(3) The Respondent shall file and serve a written submission on sanctions and why costs should not be ordered against the Respondent and on the Complainant's statement of costs within 14 days of service of the Complainant's said written submission under paragraph (2); and

(4) The parties are at liberty to apply for any further directions in writing to the Committee.

Dated this 16th day of December 2019

Mr. WONG Tim Wai
Chairman

Ms. CHAN Wai Kam, Caroline
Member

Ms. CHUI Hoi Yee
Member

Mr. CHOW Dennis Chi In
Member

Mr. NG Chi Keung, Victor
Member

Proceedings No. D-14-0982-C

IN THE MATTER OF

A Complaint made under section 34(1A) of the Professional Accountants Ordinance (Cap. 50)

BETWEEN

The Registrar of HKICPA — Complainant

AND

WONG TAM YEE (A33301) — Respondent

Disciplinary Committee:

Mr. WONG Tim Wai (Chairman)

Ms. CHAN Wai Kam, Caroline

Ms. CHUI Hoi Yee

Mr. CHOW Dennis Chi In

Mr. NG Chi Keung, Victor

Date of Decision on Sanctions and Costs: 22 June 2020

DECISION ON SANCTIONS AND COSTS

1. This is a complaint made by the Registrar of the Hong Kong Institute of Certified Public Accountants as the Complainant against the Respondent pursuant to Section 34(1A) of the Professional Accountants Ordinance Cap. 50 ("PAO") in relation to the breach of fiduciary duties and/or failure to observe, maintain or otherwise apply the fundamental principle of integrity as the director of Excel Courage Holdings Limited ("Excel") in respect of the disposal of certain shares on or about 25th September 2013.

2. There are altogether 3 complaints, as listed below:

(1) 1st Complaint: the Respondent failed to comply with the relevant laws and regulations and failed to avoid any action that discredits the profession, in breach of sections 100.5(e) and 150.1 of the Code of Ethics for Professional Accountants ("COE"), when he was found to have breached his fiduciary duties as a director in disposing of the Shares;

(2) 2nd Complaint: the Respondent was in breach of the fundamental principle of integrity under sections 100.5(a), 110.1 and 110.2(a) of the COE, as his breach of fiduciary duties above was dishonest, and he made false statements in the Sold Notes to the Shares that the sales were for full market value and that consideration had been received, when the same was not true.

(3) 3rd Complaint: the Respondent was guilty of professional misconduct under section 34(1)(a)(viii) of the PAO, by reason of his conduct under the 1st and 2nd Complaints above.

3. The Committee delivered its Decision as to liability on 16th December 2019. In the last part of the Decision after finding that all the 3 Complaints were proved against the Respondent, the parties were directed to file their written submissions on sanctions and costs.

4. The Complainant filed their written submissions and statement of costs dated 30th December 2019. On the other hand, the Respondent did not file any written submission.

5. The following is the unanimous decision of the Committee on sanctions and costs.

6. The Committee has considered all the submissions made by the parties and does not propose to set out herein all the submissions made.

7. The Committee acknowledges that every case of professional misconduct is different in regard to facts and circumstances such that the previous decisions as to sanctions imposed are of reference value only. The Committee has a wide discretion in deciding on appropriate sanctions.

8. The Committee considers that as the director of Excel in a fiduciary relationship with the company, the Respondent was required to act honestly, in good faith and in the best interests of Excel. Despite being the registered shareholder of 974,180,000 shares in Luxey International (Holdings) Limited (stock code: 8041) ("Luxey") and 147 million shares in China Railsmedia Corporation Limited (stock code: 745) ("Railsmedia") (collectively "the Shares") in Excel, and the sole director of Excel between 21st February 2011 and 25th September 2013, even relying on the Respondent's own case, the Respondent at all material times held part of the Shares in Excel for the benefit of another person.

9. Notably, the Respondent's own case is that the Respondent was beneficial owner of only 50% of the Shares, and he disposed of 100% of the Shares on 25th September 2013 without any prior consent from the other alleged beneficial owner. There was no suggestion that the financial position of Excel was materially different on 25th September 2013 yet the Shares were sold in one day.

10. Moreover, the Respondent did not act in the interests of Excel in disposing of the Shares. The Respondent sold the Shares at a 60% discount of the market price without first attempting to sell the Shares in the market; and no good reason was advanced for this.

11. In addition, the Respondent sold the Shares to Sun Xiao Xiang ("Sun"), a non-Hong Kong resident previously unknown to the Respondent or Excel, who was apparently introduced through a bank manager in mainland China. The terms of the sale were to be completed 7 days later and there was no security for the payment other than a deposit of HK$4 million.

12. Deputy High Court Judge R Ismail SC ("the Court") considered in the Judgment under HCCL 34/2013 on 26th February 2016 ("the Judgment") that the allegation against the Respondent was characterized as "theft of shares" in Paragraphs 47 and 50 of the Judgment and as misappropriation in Paragraphs 53 and 54 of the Judgment. The Committee is of the view that theft and misappropriation of the Shares clearly amount to dishonesty as dishonesty is one of the elements in order to commit the offences of theft and misappropriation.

13. Furthermore, the Court found that two other defendants, namely the 2nd and 5th Defendants, had dishonestly assisted the Respondent in his breach of fiduciary duties. If the Court found the accessories, i.e. the 2nd and 5th Defendants to have acted dishonestly, it seems clear that the main defendant, i.e. the Respondent, was also found to have acted dishonestly.

14. Moreover, the Committee considers that there was dishonesty on the part of the Respondent given that an honest person would not participate in a transaction if he knows it involves a misapplication of trust assets to the detriment of the beneficiaries. An honest person would not deliberately turn a blind eye and proceed with the transaction either as held in Paragraph 171(b) of the Judgment.

15. The Committee is of the view that integrity and honesty are cornerstones of the accountancy profession. The Committee is of the opinion that the Respondent was in dereliction of his duties by breaching the fundamental principles of integrity and honesty as stated hereinabove. The Committee is also of the view that the Court's findings and the Respondent's blatant disregard for his fiduciary duties have no doubt damaged the reputation of the accountancy profession.

16. The Committee takes into account the fact that the Respondent has no previous disciplinary record.

17. Lastly, the Committee also takes into account the totality principle having regard to individual charges established against the Respondent, the gravity of individual charge and cumulative effect of them and the ultimate sanction to be imposed on the Respondent.

18. Having considered and balanced all the above matters and the submissions of the parties, the Committee considers that the Respondent should be removed from the register of certified public accountants for a period of 2 years.

19. The Committee finds that there is no reason not to impose an order for the Respondents to pay costs to the Complainant and for the investigation and the present disciplinary proceedings according to the usual rule of costs to follow the event.

20. The Complainant submitted a statement of costs which set out the respective hourly charging rates of the staff members of the Institute who had worked on this matter and the respective amount of time spent by them. Based on the statements and submissions by the Complainant, and bearing in mind the volume of documents involved and the necessity for a hearing, the Complainant's costs shall be in the sum of HK$116,866 and the costs of the Clerk of the Committee shall be HK$11,336. The total costs awarded against the Respondent shall be in the sum of HK$128,202.

21. The Committee therefore orders that:-.

(1) The name of the Respondent be removed from the register of certified public accountants for a period of 2 years with effect from the 60th day of the date of this Order under section 35(1)(a) of the PAO.

(2) The Respondent do pay the costs and expenses of and incidental to the proceedings of the Complainant/Clerk of the Committee in the sum of HK$128,202 under section 35(1)(iii) of the PAO.

DATED this 22nd day of June 2020.

Mr. WONG Tim Wai
Chairman

Ms. CHAN Wai Kam, Caroline
Member

Ms. CHUI Hoi Yee
Member

Mr. CHOW Dennis Chi In
Member

Mr. NG Chi Keung, Victor
Member