Registrar of Hong Kong Institute of Certified Public Accountants

and

Disciplinary Committee of Hong Kong Institute of Certified Public Accountants

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[2020] HKCFI 2553

(Court of First Instance)

(Constitutional and Administrative Law List No 187 of 2016)

Thomas Au JA (sitting as an additional Judge of the Court of First Instance)

8 March 2019, 30 September 2020

Administrative law — open justice — Disciplinary Committee of Hong Kong Institute of Certified Public Accountants — "non-publicity" order constraining publication of sanctions — general principles of open justice applied to disciplinary proceedings under Professional Accountants Ordinance (Cap.50) — nature of "non-publicity" order inconsistent with open justice — "non-publicity" order quashed

Professions — accountants — disciplinary proceedings — general principles of open justice applied to disciplinary proceedings under Professional Accountants Ordinance (Cap.50)

行政法 — 公開的司法公義 — 香港會計師公會紀律委員會 — 限制發佈懲處的「非公開」命令 — 公開的司法公正的一般原則適用於《專業會計師條例》(第50章)之下的紀律處分程序—「非公開」命令的性質與公開的司法公正相抵觸 — 「非公開」命令予以撤銷

專業與專業人士 — 會計師 — 紀律處分程序 — 公開的司法公正的一般原則適用於《專業會計師條例》(第50章)之下的紀律處分程序

The Disciplinary Committee of the Hong Kong Institute of Certified Public Accountants (the DC) made an order imposing certain sanctions against an accountant and an accountancy practice (the Accountants) (the DC Order), and gave its reasons for doing so (the DC Reasons). It also made an order whereby the Registrar of that Institute (the Registrar) would, when publishing the DC Order and the DC Reasons, have to do so without revealing the sanctions imposed (the Non-Publicity Order). The Registrar brought judicial review proceedings for the quashing of the Non-Publicity Order. Although the Accountants eventually consented to the publication

of DC Order and the DC Reasons in full without any redaction, the Court continued to hear the judicial review proceedings. This was: (a) because as long as the Non-Publicity Order stood, there would be uncertainty as to what reference could be made to the sanctions at training sessions; and (b) because guidance on the proper approach for the DC to adopt when deciding whether or not to make a non-publicity order would be of utility.

Held, quashing the Non-Publicity Order, that:

(1) The general principles of open justice applied to disciplinary proceedings under the Professional Accountants Ordinance (Cap.50). The DC should take those principles into account and give them sufficient weight in view of the legislative intention that disciplinary proceedings should generally comply with notions of open justice and transparency (*Asia Television Ltd v Communications Authority* [2013] 2 HKLRD 354, *R (Wilford) v Financial Services Authority* [2013] EWCA Civ 674, *Ng Shek Wai v Medical Council of Hong Kong* [2015] 2 HKLRD 121, *Kennedy v Charity Commission* [2015] AC 455, *Registrar of Hong Kong Institute of Certified Public Accountants v X* [2017] 3 HKLRD 541 applied; *Lam Siu Po v Commissioner of Police* (2009) 12 HKCFAR 237 considered). (See paras.37, 55–60, 80.)

(2) An order in the nature of the Non-Publicity Order was *prima facie* inconsistent with open justice. Any deviation from open justice must be properly justified. The balancing exercise involved was to be heavily tilted in favour of maintaining open justice (*Law Mei Mei v Airport Authority* [2018] 4 HKLRD 312 applied). (See para.81.)

(3) The Non-Publicity Order was made unlawfully, because:

  (a) the DC had given no consideration to the principles of open justice, thus erring in principle by failing to take a relevant consideration into account and to conduct the requisite balancing exercise; and

  (b) the Non-Publicity Order, which did not prohibit the publication of the Accountants' names, was irrational in that the sanctions, which were light due to strong mitigating circumstances, ought to be, for the purposes of underlining those mitigating circumstances, published along with the Accountants' names. (See paras.84–86.)

Application

This was an application for judicial review by the Registrar of the Hong Kong Institute of Certified Public Accountants for the quashing of the order made by the Disciplinary Committee of that

Institute constraining the publication of the sanctions imposed on an accountant and an accountancy practice.

[*Editor's note*: This judgment appears to be the first one dealing specifically with the points which it decides.]

Mr Alexander Stock SC, instructed by MinterEllison LLP, for the applicant.
Mr Lau Ka Kin, instructed by Robertsons, for the respondent.
The 1st and 2nd interested parties, represented by Wilkinson & Grist, attendance be excused.

Legislation mentioned in the judgment
Hong Kong Bill of Rights Ordinance (Cap.383) s.8 arts.10, 16(2)
Professional Accountants Ordinance (Cap.50) ss.7, 7(g), (h), 10, 21, 33, 33A, 34(1)(a), (a)(vi), 35, 35(1), (3), 35B, 36(1A), 38(2), 41, 51(l)(f), by-law 35(1), Pt.V

Cases cited in the judgment
AB v Hong Kong Institute of Certified Public Accountants (HCAL 65/2005, [2005] HKEC 1030)
Asia Television Ltd v Communications Authority [2013] 2 HKLRD 354, [2013] 3 HKC 62
Chao Pak Ki v Hong Kong Society of Accountants [2004] 2 HKC 469
Chit Fai Motors Co Ltd v Commissioner for Transport [2004] 1 HKC 465
Kennedy v Charity Commission [2014] UKSC 20, [2015] AC 455, [2014] 2 WLR 808, [2014] 2 All ER 847, [2014] EMLR 19
Lam Siu Po v Commissioner of Police (2009) 12 HKCFAR 237, [2009] 4 HKLRD 575, [2010] 2 HKC 149
Law Mei Mei v Airport Authority [2018] 4 HKLRD 312, [2018] HKCFI 1940
Ng Man Yin v Registration of Persons Tribunal [2014] 1 HKLRD 1188, [2014] 5 HKC 1
Ng Shek Wai v Medical Council of Hong Kong [2015] 2 HKLRD 121, [2015] 3 HKC 455
R (Wilford) v Financial Services Authority [2013] EWCA Civ 674, [2013] CP Rep 43
R v Advertising Standards Authorities, ex p Vernons Organisation Ltd [1992] 1 WLR 1289, [1993] 2 All ER 202
R v Legal Aid Board, ex p Kaim Todner [1999] QB 966, [1998] 3 WLR 925, [1998] 3 All ER 541
Registrar of Hong Kong Institute of Certified Public Accountants v Cheung Yiu Hung [2018] HKCA 463, [2018] HKEC 2134
Registrar of Hong Kong Institute of Certified Public Accountants v X [2017] 3 HKLRD 541

Other materials mentioned in the judgment

Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, arts.6, 6(1), 10

Hong Kong Institute of Certified Public Accountants: Disciplinary Committee Proceedings Rules, rr.11, 26(2), 33

Hong Kong Institute of Certified Public Accountants: Hong Kong Auditing Standard, Standard 39

Legislative Council (HKSAR): Report of the Bills Committee on Professional Accountants (Amendment) Bill 2004 (LC Paper No CB(1)2265/03/04), 30 June 2004, paras.3, 4, 18–20

Treverton-Jones, Foster and Hanif, *Disciplinary and Regulatory Proceedings* (9th ed., 2017), paras.9.06–9.23

JUDGMENT

Au JA

A. Introduction

1. This is the judicial review application brought by the Registrar (the Registrar) of the Hong Kong Institute of Certified Public Accountants (the Institute) against an order (the Non-Publicity Order) made by the Disciplinary Committee (the DC) of the Institute dated 8 September 2015.

2. The Non-Publicity Order was made in a disciplinary proceedings (the Disciplinary Proceedings) brought against the 1st and 2nd interested parties (collectively "the Accountants") under the Professional Accountants Ordinance (Cap.50) (the PAO).

3. In the Disciplinary Proceedings, the DC upheld the substantive complaint made against the Accountants and imposed on them certain sanctions (financial penalties and costs order). The relevant convictions, sanctions and costs order have been set out in the order of the DC dated 8 September 2015 (the DC Order), which also contained the Non-Publicity Order. The DC also gave written reasons for its decision on the same date (the DC Reasons).

4. In this respect, it is to be noted that under the PAO and the Disciplinary Committee Proceedings Rules (the Rules), the Registrar is to publish the order made by the DC in a disciplinary hearing.[1] However, given the Non-Publicity Order, in relation to the Disciplinary Proceedings, the Registrar would only be able to publish the DC Order and the DC Reasons only to the extent without revealing the sanction made thereof.

5. In this application, the Registrar seeks to quash the Non-Publicity Order. It is the Registrar's case that the order is unlawful, because (a) it runs contrary to the principle of open justice and the legislative intention under the PAO; and (b) it is irrational.

[1] See r.33 of the Rules.

6. The Registrar is represented by Mr Stock SC, and the DC by Mr Lau.

7. However, it is pertinent to note that after this Court has granted leave for the Registrar to apply for judicial review, and after a chequered course of events (which will be described more below), the Accountants have eventually consented to the publication of the DC Reasons and the DC Order in full without any redaction.

8. By the time of the hearing:

(1) On their request, the Accountants as interested parties were excused from attendance. They have however pointed out that the application has become academic as they have consented to the publication of the unredacted DC Reasons and DC Order.

(2) The DC has adopted a neutral position in these proceedings, although it would through Mr Lau make relevant submissions to assist the court in relation to some of the issues raised in the judicial review. The DC has further indicated that it will abide by the court's judgment.

9. Before I consider the issues raised in this application, it is relevant to set out the chequered background leading to the hearing. This is not controversial, and is largely taken from Mr Stock's skeleton submissions.

B. Background

B1. Events prior to the grant of leave to apply for judicial review

10. The Disciplinary Proceedings were in respect of a complaint made against the Accountants regarding audit work on the accounts of Heng Tai Consumables Group Ltd (Heng Tai). The complaint related to whether the requirements of Hong Kong Auditing Standard 39 (HKAS 39) were complied with during the audit.[2]

11. On 1 June 2015, the DC held a hearing for the Disciplinary Proceedings (the DC Hearing). It was held in public, and there was no application by any party to hear it in private. During the DC Hearing, the Accountants submitted that if it was necessary to publish the details of the case for education of other members of the profession, this should be on a "no name" basis. The DC did not indicate that it might make an order constraining publication, and the Registrar's representative did not address the point.[3]

12. On 8 September 2015, the DC made the DC Order with the DC Reasons, by which the DC:

[2] The complaint was referred to the DC by the Council of the Institute pursuant to s.34(IA) of the PAO in respect of a matter falling within s.34(1)(a).

[3] Form 86, paras.6 and 7; transcript excerpt [B1/6/75].

(1) Found the Accountants to be in breach of s.34(1)(a)(vi) of the PAO by failing or neglecting to observe, maintain or otherwise apply professional standards, namely HKAS 39.[4]
(2) Considered that there were strong mitigating factors on sanctions.[5]
(3) Indicated that it would accordingly take a very lenient approach on penalty, ordering the Accountants to pay a penalty of HK$10,000 (each) and certain costs.[6]
(4) Made the Non-Publicity Order.[7]

13. The Registrar's case is that he was surprised and gravely concerned by the Non-Publicity Order. However, the Registrar considered that judicial review would at that stage be premature due to possible alternative remedies.[8] On 24 September 2015, the Registrar wrote to the DC requesting it to reconsider the Non-Publicity Order on various grounds. Correspondence ensued, but on 26 October 2015 the DC indicated that its order and reasons would stand.[9]

14. On 7 October 2015, the Accountants appealed to the Court of Appeal against the DC Order pursuant to s.41 of the PAO. The Registrar filed a Respondent's Notice[10] in that appeal challenging, among others, the Non-Publicity Order on the basis that it: (a) exceeded the DC's jurisdiction; and (b) ran contrary to art.10 of

[4] See DC Order, and DC Reasons at para.6.1. The shortcoming comprised a failure to ensure that a decline in value of shares in China Zenith Chemical Group Ltd be reflected in profit and loss in Heng Tai's audited statements for the year ended June 2009.
[5] See DC Reasons, at paras.4.6 and 6.2. The strong mitigating factors included that: (a) this was not a case where the Accountants had been oblivious to the existence of HKAS 39, in fact they had duly carried out an assessment of Heng Tai's impairment assessment; (b) the Accountants had committed an error of judgment and came to the wrong conclusion, which had been largely contributed to by the lack of authoritative interpretation and diversity in practices as regards HKAS 39; (c) the Institute could have been more proactive by issuing guidelines and practice notes; (d) the decline in fair value of China Zenith shares, though not recognised in profit and loss, had been reflected as change in fair value of available-for-sale financial assets and the basis for not making an impairment assessment was stated in the notes; (e) the decline in value was not realised loss, and in the overall context of Heng Tai's financial position the impact of the decline in fair value could not be said to be substantial; (f) it was unlikely that any investors would have suffered loss as a result of the non-compliant accounting treatment.
[6] See DC Reasons at paras.6.2(d)–6.5.
[7] See DC Reasons at paras.6.2(d) and 6.6.
[8] Form 86, paras.13 and 14.
[9] Form 86, paras.15–20; correspondence at [B1/14/188 to B1/19/202].
[10] 26 October 2015 [B1/9/89–93].

the Hong Kong Bill of Rights (HKBOR),[11] and the principles of open justice.

15. On 20 July 2016, the Court of Appeal gave judgment in CACV 233/2015 with reasons dated 30 August 2016 (the CA Judgment). The Court of Appeal: (a) dismissed the Accountants' statutory appeal (see [4.44]); and (b) dismissed the Respondent's Notice on the basis that it lacked jurisdiction to hear the Registrar's cross-appeal in respect of the Non-Publicity Order (see paras.5.1–5.12).

16. On 19 October 2016, the Registrar applied for leave to bring these judicial review proceedings. On 7 February 2017, this Court granted leave to apply for judicial review. The parties however did not then take any active steps to proceed with the application until much later in light of the following events.

B2. Events following the grant of leave to apply for judicial review

17. On 27 April 2017, the Accountants obtained leave to appeal to the Court of Final Appeal (the CFA) from the CA Judgment.

18. At the same time, on 2 June 2017, the Court of Appeal gave judgment in a different case in *Registrar of the Hong Kong Institute of Certified Public Accountants v X* [2017] 3 HKLRD 541. As will be explained later, this judgment is relevant to the consideration of some of the issues arising in the present case.

19. By a judgment dated 22 December 2017 (the CFA Judgment),[12] the CFA dismissed the Accountants' appeal.

20. From 22 December 2017 to 6 March 2018, the Registrar and the Accountants corresponded (through their respective solicitors) on the ambit and effect of the Non-Publicity Order. In summary, the Accountants contended that the order constrained the Registrar from publishing the DC Order, DC Reasons and any matters pertaining to the Disciplinary Proceedings (and even that the Registrar should not publish the CA Judgment or the CFA Judgment). The Registrar contended that the order only constrained publication of the penalty and costs order imposed by the DC, such

[11] Article 10 provides: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children."

[12] (2017) 20 HKCFAR 556.

that it could publish a redacted version of the DC Reasons, as well as the CA Judgment and CFA Judgment in full.[13]

21. By letter dated 7 March 2018, the DC clarified the Non-Publicity Order to the effect that: (a) the order constrained publication of the sanction; (b) since the substance of the DC Order was the sanction, it followed that the DC Order should not be made public without the Accountants' consent; (c) the portions of the DC Reasons relating to sanction (namely, paras.6.2(d), 6.3, 6.4, 6.5 and 6.6) should not be published without the Accountants' consent; (d) in passing, the DC was of the view that the clarification request was academic.

22. There followed further correspondence as to what could or should be published. Following the DC's clarification of the Non-Publicity Order, the Accountants took the position that any publication of the DC Reasons should be in full (rather than redacted as *per* the DC's clarification), so as to provide a full picture to the reader.[14] By letter dated 29 March 2018, the Accountants informed the Registrar that they would consent to the publication of the full and unredacted version of the DC Reasons.

23. On 9 April 2018, the Institute published the DC Order and DC Reasons in full on its website and issued a press release. The April 2018 issue of the Institute's monthly magazine included a summary of the DC Order, DC Reasons and sanctions imposed.[15] The Registrar thereafter proceeded with the judicial review.

C. This judicial review

C1. Grounds of judicial review

24. The Registrar initially raised the following grounds of challenge in the Form 86:

(1) The Non-Publicity Order is *ultra vires* as the DC has no jurisdiction to make such kind of order (the Jurisdiction Ground).[16]

(2) The Non-Publicity Order is unlawful as:[17]

    (a) It represents a significant and unjustified interference with the principle of open justice (the Open Justice Ground).

[13] See 2nd Affirmation of Donald Leo, paras.12–16; correspondence at [B1/20/203 to B1/30/224].
[14] 2nd Affirmation of Donald Leo, para.22; correspondence at [B1/32/227 to B2/40/271].
[15] See: 2nd Affirmation of Donald Leo, paras.25–26; press release at [B2/45/333-337]; website extracts at [B2/44/319-320 and B2/46/338-344]; magazine extract [B2/47/348].
[16] Form 86, paras.34–36.
[17] Form 86, paras.34 and 37–39.

(b) It is in any event irrational in light of the principle of open justice (the Irrationality Ground).

(3) The Non-Publicity Order is tainted with procedural unfairness as the Registrar was not given an opportunity to make submissions in this respect before it was made (the Procedural Unfairness Ground).[18]

25. However, given the change of events and the decision in *Registrar v X*, at the hearing, Mr Stock has confirmed that the Registrar is no longer pursuing the Jurisdiction Ground[19] and the Procedural Unfairness Ground.

26. Before I deal with the remaining grounds of challenge, the court has to consider the question of whether, given the Accountants' consent to have the full DC Reasons and Order published, this judicial review has become academic and therefore the court should not entertain it.

C2. Whether this judicial review has become academic

27. It is well established that the court would not generally entertain a judicial review the issues of which have become academic. The relevant principles applicable where a matter is said to be academic or hypothetical have been set out by Ma CJHC (as he then was) in *Chit Fai Motors Co Ltd v Commissioner for Transport* [2004] 1 HKC 465, [20]. For the present purpose, Mr Stock has summarised them as follows:

(1) Where the question is hypothetical or academic only because the real dispute that drove the parties to litigation happens no longer to be in existence at the time of the hearing, even though the relevant facts giving rise to the dispute were real and actually took place, the court does have jurisdiction to hear and determine the issue. In deciding whether to do so, which can be said to be a matter of discretion, the court will closely examine the relevance or utility of any decision.

(2) In the public law sphere, this may be easier to demonstrate than in relation to private rights. This is because very often in public or administrative law cases, the duties of public bodies fall to be exercised on a continuing basis not only in relation to the parties before the court but also perhaps to others in the future.

[18] Form 86, paras.29–33.

[19] Mr Stock explains that, in light of the decision in *Registrar v X* (see [51] below), he is contended to accept for the present purpose that the DC has jurisdiction to make an order in the nature of the Non-Publicity Order. However, the Registrar reserves his right to pursue this issue if necessary in another occasion.

(3) However, the discretion is to be exercised with caution and the court should only do so where there is good reason in the public interest for doing so, for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future; or where the same point is likely to or may well arise between the same parties.
(4) The said principles are non-exhaustive.

28. Mr Stock has also drawn the court's attention to the case of *Law Mei Mei v Airport Authority* [2018] 4 HKLRD 312, where Chow J at [45]–[46] in citing the above approach, noted that the listed factors are non-exhaustive, and exercised his discretion to determine the judicial review proceedings even though the relevant regulations had been amended subsequent to the grant of leave in order to remove the issue under dispute.[20]

29. As mentioned above, the Accountants have raised the observation[21] that this judicial review has become academic due to (a) the publication of the CA Judgment and CFA Judgment which contain the relevant parts of the DC's Reasons; and (b) the publication of the DC Reasons on the Institute's website with their consent However, as the Accountants at their request have been excused from attending the hearing, they have made no submission or filed any evidence in this respect.

30. Mr Lau for the Institute has also confirmed that he would not make any submission under this question.

31. On the other hand, the Registrar has explained in evidence why the issues raised in this judicial review have not been rendered academic:[22]

(1) Notwithstanding the publication of the DC Order and DC Reasons, the Non-Publicity Order itself still stands. It remains valid and binding on the Registrar and the Institute (and arguably anyone else), and proscribes future publicity of the sanction unless with the Accountants' consent. Accordingly, the matter under complaint, *viz* the Non-Publicity Order itself, is not academic.
(2) Importantly, the Registrar is seriously concerned that the Non-Publicity Order (and the reasons given for it) set an incorrect and undesirable precedent for the making of

[20] Chow J at [47]–[49] relied on the injustice which would result from dismissing the application in circumstances where the Secretary for Security had amended the relevant regulations after the event in order to avoid the subject proceedings.
[21] See their letter dated 16 July 2018.
[22] See 2nd Affirmation of Donald Leo, paras.29–39.

permanent non-publication orders by the DC, which is likely to prompt future applications for similar orders, and potentially the future grant of similar orders.

(3) The Registrar's above said concern is illustrated by the fact that, in another set of disciplinary proceedings, the Accountants applied for an order permanently restricting publication of the DC's decisions on liability and sanctions. It is further illustrated by the lengths to which the Accountants went in the present case (prior to 29 March 2018), to constrain publication of the DCs Order and Reasons. Needless to say, professionals who are the subject of adverse disciplinary findings generally have a strong personal interest in avoiding such findings being publicised; and can be expected to frequently fight "tooth and nail" to constrain publication if such constraint is available.

(4) It is the Registrar's position that permanent non-publication orders of this nature run contrary to fundamental principles of open administration of justice, the statutory scheme and purpose of the PAO, and the public interest. The publication of adverse disciplinary decisions is central to the disciplinary functions performed pursuant to Pt.V of the PAO.

(5) It has been the Institute's long-standing practice to make public all disciplinary decisions in which complaints are proved, in accordance with the principle of open administration of justice. The publication of the DC decisions has previously been in accordance with the said general practices determined by the Institute rather than the DC on a case-by-case basis. The approach in the Non-Publicity Order, therefore, represents a departure from longstanding practice. A permanent non-publicity order of this nature is, apparently, unprecedented for a DC under the PAO. It is a point and precedent which needs to be corrected.

(6) Further, this case raises important points as to the permissibility of, and correct approach to, permanent non-publication orders in disciplinary proceedings under the PAO, including whether a desire for leniency or strong mitigating factors are *per se* factors which justify such an order. To the extent that there is power in the DC to make such orders, the DC should be informed of the proper and (it is submitted) very limited circumstances in which a non-publicity order could be made and the principles which apply. The Institute is not aware of existing Hong Kong case law which deals with this point specifically, and it is submitted that a court decision will be of value for the future.

(7) As explained above, publication only occurred long after leave was granted to apply for judicial review. By that stage, a substantial portion of the costs of these proceedings had already

been incurred. The Registrar considered it more efficient, in terms of the Institute's and court's resources, to continue with the current judicial review proceedings rather than risk the need for similar proceedings to be commenced in respect of future DC orders. The Registrar has no right of statutory appeal in respect of a DC order, nor can he challenge such an order by Respondent's Notice in an accountant's appeal. It is accordingly only open to the Registrar to challenge a DC's non-publicity order by judicial review.

32. Bearing in mind the applicable principles as summarised above, I agree that notwithstanding the publication of the DC Reasons with the Accountants' consent, the court should continue to hear the judicial review. This is so as:

(1) As pointed out by counsel, the matter is not in truth academic, as the Non-Publicity Order still stands.
(2) Further, given that the Non-Publicity Order still stands, the Registrar and the Institute will be put in an uncertain and difficult position whenever in the future it needs to refer to the DC Reasons again. This possibility is not a fanciful one. For example, as the Registrar has explained in evidence,[23] it is not unusual that in training sessions, it may from time to time be necessary to refer to various disciplinary rulings for the purposes of education and illustrations. Despite the publication of the DC Reasons in its website, it is still uncertain if the Institute will need to seek consent from the Accountants again every time it intends to refer to the DC Reasons in the future.
(3) Finally, there are good reasons in the public interest to entertain the challenge, as the court's decision will likely have relevance and utility for future purposes in providing guidance as to the DC as to what is the proper approach it should adopt in considering whether or not to make a non-publication order.

33. I will therefore now turn to consider the relevant grounds of challenge.

C3. The grounds of challenge

34. Given the way the submissions are advanced by Mr Stock in the skeleton and at the hearing, the Open Justice Ground and the Irrationality Ground can be considered conveniently together.

[23] See 2nd Affirmation of Donald Leo, para.29.

C3.1 The Registrar's submissions

35. Under these grounds, the Registrar contends that the Non-Publicity Order represents a significant and unjustified interference with the principles of open justice and, with those principles in mind, it was made irrationally.

36. Mr Stock's submissions run in gist as follows.

37. The general principles on open justice are well established and have been summarised by the Court of Appeal in *ATV v Communications Authority* [2013] 2 HKLRD 354, [17]–[36]. For the present purposes, they include the following as helpfully summarised by Mr Stock:

(1) Open administration of justice is a fundamental principle of the common law, which is of great importance, for a number of reasons. The public nature of proceedings deters inappropriate behaviour on the part of the court. It also maintains the public's confidence in the administration of justice. It makes uninformed and inaccurate comment about the proceedings less likely. See: [19].

(2) From the litigants' perspective, open justice also gives effect to their rights to a public hearing guaranteed in art.10 of the HKBOR. From the public's perspective open justice, which carries with it the freedom to attend and report proceedings, gives substance to the media's and the public's rights to freedom of expression and to seek and impart knowledge, guaranteed under art.16(2) of the HKBOR. See: [20] and [21].

(3) Any restriction on open justice represents a compromise between important interests, rights and freedoms and must be justified by considering and balancing all pertinent interest, rights and freedoms. See: [22] and [30].

(4) Certain matters are firmly established not to, of themselves, justify any restriction on open administration of justice, including: publicity of litigation leading to embarrassment and inconvenience or economic damage; professional embarrassment and possible damage to professional reputations. Unwanted publicity and embarrassment are some of the normal incidences of litigation and inevitable consequences of open justice. See: [23]–[25].

(5) However, open justice is a means, albeit an important one, to the end of doing justice. Where open justice would frustrate the ultimate aim of doing justice, it is a most important if not decisive consideration to take into account when balancing. See: [26].

(6) Apart from the interests of justice, there are other similarly important considerations that may justify restrictions on open

justice (morals, public order, national security, or when the interest of the private lives of all parties so requires). Other miscellaneous considerations may be relevant to balancing, such and the nature of the proceedings. See [31] and [34].

38. Mr Stock has fairly drawn the court's attention to the fact that *ATV* is not in the context of disciplinary proceedings.[24] He however submits that as a matter of principle, there is no reason why these principles on open justice do not or should not apply in disciplinary proceedings.

39. In this respect, Mr Stock says as a matter of fact, in line with the open justice principles, it is the Institute's long standing practice on publication of disciplinary decisions in which complaints are proved. In particular:

(1) Prior to October 2015, the Institute's practice was to publish all such disciplinary decisions in full (including the names of the respondents) on the Institute's website for a period of one year or until the period of any penalty had been completed, whichever was the later. Thereafter, the names of the respondents would be redacted from the decision but the decision would remain available on the Institute's website on a "no names" basis for a period of five years from the date of the decision.
(2) In October 2015, the Council changed the policy of the Institute, and since that time the Institute's policy and practice has been to publish all such disciplinary decisions in full (including the names of the respondents) for a period of five years from the date of the decision with no redactions of any kind.

40. The Registrar has also explained the central importance of such publication to the Institute's functions.[25] In particular, it is the Registrar's position that publication of these decisions:

(1) Protects the public by informing them of professional accountants against who adverse disciplinary findings have been made and allowing them to make informed choices;
(2) Educates and informs the profession as to the requirements of professional standards and the likely consequences of breach;
(3) Promotes transparency of the disciplinary regime and the interests of the public and profession in transparency; and

[24] The context was ATV's application for an appeal in respect of its judicial review proceedings (relating to an investigation by the Communications Authority) to be held in camera.
[25] See 2nd Affirmation of Donald Leo, paras.34–37.

(4) Promotes the objectives of the Institute as set out at s.7 of the PAO, which include: regulating the practice of the accountancy profession; preserving and maintaining its reputation, integrity and status; discouraging dishonourable conduct and practices.

41. The publication of decisions therefore serves the public interest and fulfils the objects of the Institute by making transparent the operation of the regulatory regime and the supervision of the accountancy profession, and through providing guidance as to the standards required of members of the accountancy profession and the likely consequences of disciplinary breaches.

42. Indeed, Mr Stock submits that when the PAO is construed in its proper context and in its statutory framework, the legislative intention of the PAO is also underlined by and consistent with the principle of open justice. Counsel explains as follows.

43. The PAO provides for the regulatory regime for the accountancy profession. Amongst other things, the PAO establishes the Institute as the profession's principal regulator. The Institute is tasked with regulating the practice of the accountancy profession in Hong Kong, including preserving the reputation, integrity and status of the profession and discouraging dishonourable conduct and practices of certified public accountants (see s.7(g) and 7(h) of the PAO). The Institute is managed by the Council established under s.10 of the PAO. The Council is assisted by the Registrar, who is appointed by the Council under s.21 of the PAO.

44. The PAO further creates a disciplinary regime whereby disciplinary allegations in relation to a certified public accountant, firm or corporate practice may be referred to certain Disciplinary Panels for inquiry. Specifically, s.34(1) lists various categories of conduct on the part of a certified public accountant, firm or corporate practice which constitutes a disciplinary offence. Upon a matter being referred to the Disciplinary Panels, a DC will be convened in accordance with s.33 of the PAO which will conduct a hearing in accordance with the PAO and the Rules. Section 36(1A) of the PAO expressly requires every hearing of the DC to be *held in public*, unless the DC determines that the interests of justice require a hearing or any part thereof to be private. This is consistent with the principle of open administration of justice.

45. At the conclusion of disciplinary proceedings, the DC will determine whether the respondent(s) have committed a disciplinary offence and, if so, may impose certain orders by way of sanction under s.35(1) of the PAO. Section 35 does not include any express power to impose a restriction on the publicity of sanctions.

46. Thus:

(1) If a DC is satisfied that a complaint referred to it under s.34 of the PAO is proved, it may make one of a range of orders specified in s.35(1), including order that the name of a certified public accountant be removed from the register, that a certified public account be reprimanded, or pay a financial penalty or costs.

(2) Section 35(3) of the PAO provides that a DC shall cause a copy of any order under sub-s.(1)(a) (ie, an order for removal of name from the register) to be published in the *Gazette* together with a summary of the nature of the complaint to which it relates.[26]

(3) Section 36(1A) of the PAO provides that every hearing of the DC shall be *held in public* unless the DC determines that in the interests of justice a hearing or any part thereof shall not be held in public.

(4) The Rules are promulgated by the Council of the Institute pursuant to s.51(l)(f) of the PAO.[27] Rule 11 provides that the Chairman or the DC may, in their discretion and at any stage of the proceedings "dispense with or vary any of the requirements of the [Rules] ... or make such directions for the conduct of the proceedings as they consider appropriate ...".

(5) Rule 26(2) provides that "the hearing shall be *held in public unless* the [DC] determines (on its own motion or on application) that *in the interests of justice a hearing or part thereof shall be held in private*". (*Emphasis* added.).[28]

(6) Rule 33 provides that the Clerk shall file any order made by the DC under s.35(1) or 35B of the PAO, or by-law 35(1) "with the Registrar, who shall cause a copy of the order to be served forthwith on the Respondent ... and to be published in accordance with the provisions of the [PAO] and the prevailing policy of the [Institute]."

47. The legislative history of s.36(1A) of the PAO, which requires the disciplinary hearing be held in public unless otherwise determined by the DC *in the interests of justice*, is this.[29] The provision was introduced into the PAO in 2004 at the same time as other amendments to the disciplinary regime to enhance oversight. The position was altered as compared to the previous position under

[26] This is subject to a proviso that no such order shall be so published before the expiry of 30 days after service of the order on the professional accountant or, in the case of an appeal to the Court of Appeal under s.41, before the appeal is finally determined. See also s.38(2) of the PAO.

[27] Previously s.33A: see Affidavit of Linda Biek, para.21.

[28] Rule 26(3) provides that any application for the hearing or any part to be held in private shall be made in writing (stating the grounds) prior to the hearing and shall be submitted to the Clerk who shall refer the application to the DC for determination.

[29] See 2nd Affirmation of Donald Leo, paras.34 and 35.

the Rules for hearings in camera unless the DC decided otherwise. The rationale for the change was an approach of greater transparency, accountability and consistency with the provisions of the HKBOR, such that public disciplinary proceedings were adopted as the normal or default position. See: Report of the Bills Committee on Professional Accountants (Amendment) Bill 2004 (LC Paper No CB(1)2265/03/04) dated 30 June 2004 (the Bills Committee Report) at paras.18–20 (also paras.3 and 4).[30]

48. Further, s.38(2) of the PAO provides that the Registrar shall not remove the name of a certified public accountant from the register, record a reprimand or penalty or an order to pay costs and expenses or an order in respect of practicing certificate in the register, or enforce payment of a penalty or costs order until (in effect) the expiry of the period for a statutory appeal or the resolution of such an appeal. The register in question and its intended contents are set out in s.22 of the PAO. It is Mr Stock's submission that s.38(2) of the PAO anticipates that, subject to the time constraint contained therein, reprimands, penalties and costs orders imposed by the DC are recordable in the register and accordingly open to public inspection.[31]

49. In any event, Mr Stock submits that the following authorities both in Hong Kong and the UK also support that the principles of open justice should apply equally to disciplinary proceedings.

50. *Registrar v X* concerns a different set of disciplinary proceedings, and the different (though potentially related) issue of a temporary restraint or stay on publication of an adverse DC decision pending the resolution of a statutory appeal under s.41 of the PAO. In that case, the CA acceded to the accountants' application and ordered an interim stay of publication of the DC's decision pending the final determination of the accountants' statutory appeal or further order.

51. For the present purpose, Mr Stock has highlighted the following features of the CA's judgment:

(1) The Court of Appeal held that the DC has jurisdiction to publish its decisions and also to order that its decisions not be published. The Court of Appeal's reasoning was based on r.11 of the Rules, rather than any provision in the PAO itself. See [10]–[15]
(2) The Court of Appeal held that the Court of Appeal has jurisdiction to restrain or stay publication of a DC decision pending appeal: see [21]–[28].

[30] See also *Registrar v X* at [33].
[31] On this see *Registrar v X* at [41]–[42], including the conclusion that publication on the Institute's website may be regarded as recording in the register.

(3) The Court of Appeal held that the statutory policy and legislative intent of the PAO supported non-publication (and non-enforcement) of a DC's reprimand, penalty and costs order in the period pending resolution of a statutory appeal (citing in particular s.38(2) of the PAO): see [29]–[42] (especially [41]).

(4) In deciding to stay publication pending appeal, the Court of Appeal applied a balancing test taking into account various features and interests: see [43]–[61], especially [61] for the material factors.

(5) The Court of Appeal recognised the relevance and "great importance" of public interest considerations supporting the timely publication of DC decisions: [56]–[58] and [61]. The said public interest factors included: the public interest in knowing, in a timely manner, the outcome of disciplinary proceedings which have been heard in public so as to promote transparency and accountability of the disciplinary process; the public interest in the accountancy profession, which plays a critical role in ensuring the orderly and lawful conduct of commercial activities; the purpose of disciplinary proceedings to preserve and maintain the reputation, integrity and status of the accountancy profession and to discourage dishonourable conduct; that timely publication of decisions provides guidance on required standards and the likely consequences of breaches to enable members of the public to make informed decisions whether to engage the services of accountants.

(6) Whilst these public interest factors were expressly recognised to be of great importance, they were (in that case) outweighed by other considerations, including the statutory policy supporting an interim stay of publication pending appeal: see [61].

52. In the premises, Mr Stock stresses that in the specific context of disciplinary proceedings by the DC under the PAO, the Court of Appeal in *Registrar v X* has expressly recognised the significance of open justice and the "great importance" of various public interest considerations supporting the timely publication of DC decisions.

53. *Ng Shek Wai v Medical Council of Hong Kong* [2015] 2 HKLRD 121 is a judicial review brought by a member of the public to quash the decision of the Medical Council refusing to disclose the identity of the disciplinary inquiry members, legal adviser and defence counsel. In allowing the judicial review, Godfrey Lam J held, among others, that:

(1) The principle of open administration of justice is a cardinal principle of the common law and generally regarded as a constitutional right ([59] and [88]);
(2) Whilst it has been expressed in strong terms it is not absolute and can be constrained where necessary for the paramount object of doing justice ([61]);
(3) Whilst its requirements depend on the facts of a particular case and may involve balancing, open justice is a question of principle rather than discretion ([88]); and
(4) The principle has application to disciplinary tribunals and functions exercising judicial or quasi-judicial power ([66]).

54. *Chao Pak Ki Raymund v Hong Kong Society of Accountants* [2004] 2 HKC 469 (cited in *Registrar v X* at [57]) concerns another case in the context of disciplinary proceedings under the PAO. Hartmann J (as he then was) considered and rejected an application for anonymisation in judicial review proceedings brought by accountants in respect of disciplinary proceedings under the pre-amendment PAO. The learned Judge emphasised the public interest in the regulation of the accountancy profession and transparency of court proceedings arising out of its regulation. See: [16]–[17], which are cited in *Registrar v X*. The learned Judge further reasoned that: (a) inherent in the principle of open justice is that, unless the interests of justice otherwise dictate, the parties' identities should be known; a great many litigants would rather enter litigation behind the shield of anonymity but parties to litigation have to accept the embarrassment and danger to their to their reputation that can be inherent in litigation (at [15]); (b) the mere fact that the applicants wished to avoid professional embarrassment which might arise from publication of the fact that they are the subject of a disciplinary inquiry is not on its own sufficient to justify the court interfering with the public nature of the proceedings (at [20]).

55. For completeness, Mr Stock also refers the court to:

(1) *Lam Siu Po v Commissioner of Police* (2009) 12 HKCFAR 237, in which the CFA held that the prohibition on legal representation in the Police (Discipline) Regulations was incompatible to art.10 of the HKBOR. In particular:

    (a) the CFA discussed on the question of whether art.10 applies to disciplinary proceedings at [24], *per* Bokhary PJ, and at [58]–[93], *per* Ribeiro PJ; and
    (b) the court reasoned (though the point was not directly in issue) that the publicity requirements in art.10 do not lead to the conclusion that disciplinary proceedings must

be in public nor that their results must be published: [19], *per* Bokhary PJ, and [121], *per* Ribeiro PJ.

(2) *AB (a firm) v Hong Kong Institute of Certified Public Accountants* (HCAL 65/2005, [2005] HKEC 1030, 30 June 2005), in which Hartmann J (as he then was) refused to grant leave to apply for judicial review in respect of a DC decision to hold a disciplinary hearing in public rather than in private, reasoning, *inter alia*, that the decision made was within the DC's discretion (at [22], [24], [31]–[35]).[32]

56. Mr Stock also draws the court's attention to the English authorities on public hearings and reporting in the context of disciplinary proceedings summarised and discussed in *Disciplinary and Regulatory Proceedings*, Treverton-Jones QC, Foster QC and Hanif, (9th ed., 2017) at paras.9.06–9.23. In particular, Mr Stock points to the following observations by the learned authors:

(1) An order restraining publication of the normally reportable details of a case is a derogation from the principles of open justice and an interference with the public's rights under art.10 of European Convention on Human Rights (ECHR).[33] The tribunal ought ordinarily to follow the course which involves the least restriction on the principle of open justice, and it will have to balance the various common law and convention rights of all interested parties. (see para.9.14)
(2) Material presented in open court should generally be released to the public, including journalists. The same applies to material presented at a disciplinary hearing to which the public has access. Under the ECHR, the principle of open justice is expressly protected by art.6(1)[34] which provides that in the determination of a person's civil right and obligations "judgment shall be pronounced publicly" (para.9.18). The exceptions to art.6 ECHR in respect of excluding the press and public from a hearing are to be constructed restrictively (paras.9.11 and 9.12).
(3) At para.9.21, the authors express the view that it is hard to see how a disciplinary tribunal could fulfil the purpose of art.6(1) without pronouncing its judgment publicly.

[32] Mr Stock has pointed out that: (a) whilst s.36(1A) had been added to the PAO, the Rules had not yet been amended to similar effect ([17] and [18]); (b) the court noted public interest factors favouring transparency ([25] and [35]); (c) the court did not consider the open justice principles *per se*; there was no argument that the DC had breached open justice, given that the complaint was that the proceedings were to be held in public rather than private (ie, the reverse scenario to the present).

[33] Which protects the rights of freedom of expression, similar to art.16 of the Hong Kong Bill of Rights.

[34] Which are similar to art.10 of the Hong Kong Bill of Rights.

57. Further, in *R (Wilford) v Financial Services Authority* [2013] EWCA Civ 674, W sought judicial review of a decision notice issued by the Financial Services Authority (the FSA) imposing on him a disciplinary penalty. The disciplinary proceedings were private; and the first instance judicial review hearing was held in private with a redacted and anonymised judgment. On the FSA's appeal, the English Court of Appeal refused applications for similar orders in respect the appeal. The court's reasoning included that:

(1) Anonymisation and the redaction of judgments both represent derogations from the principle of open justice which must be justified, on the basis of cogent evidence, as strictly necessary in order to secure the proper administration of justice. The FSA was performing a disciplinary function. No doubt its proceedings would have been embarrassing for W if his identity had been made public and it may be that they would have caused some damage to his professional reputation, but he would not have been entitled to have his identity protected on those grounds if, for example, he faced criminal charges. (at [8])
(2) It was not strictly necessary in the interests of justice for the court to anonymise and redact its judgment in order to protect W's identity. The principle of open justice required that the court's judgment should be published in full unless there are overriding grounds for not doing so. Once W stepped outside the private disciplinary proceedings whether by referring them to the Upper Tribunal or applying for judicial review, he brought the matter into the public forum where open justice applied. (at [9])

58. Mr Stock has also helpfully referred this Court to the following English authorities:

(1) *R v Legal Aid Board, ex p Kaim Todner* [1999] QB 966 (cited in *ATV* at [19], [23], [34] and [35], and *Chao Pak Ki Raymund* at [14]–[15]) where the court (a) said an interference with open justice for a limited period is less objectionable than a permanent one;[35] (b) observed the apparent reference to a changing position or trend from private to public as regards disciplinary proceedings more generally (p.976A–B).[36]
(2) *R v Advertising Standards Authorities, ex p Vernons Organisation Ltd* [1992] 1 WLR 1289 (passages cited in *Registrar v X* at [58]).

[35] See also *Chao Pak Ki Raymund*, [11].
[36] See also *Disciplinary and Regulatory Proceedings*, para.9.06.

59. Mr Stock therefore says, even accepting for the present purpose that the DC has jurisdiction to make such an order, the following principles can be derived from the above authorities which are relevant in respect of permanent non-publication orders under the PAO:

(1) The policy and statutory purpose of s.36(1A) of the PAO is that DC hearings should by default be in public unless the interests of justice require otherwise, in order to promote open justice, transparency and consistency with the HKBOR (see also r.26(2) of the Rules). This position is consistent with general case law on open justice, which requires deviations from open justice to be properly justified.
(2) Section 38(2) of the PAO contemplates and intends the recording in the register (which is open to public inspection) of reprimands, penalties, and costs orders, subject to the time-constraint contained therein.
(3) In balancing competing interests, the Court has recognised the "great importance" of the various public interest considerations supporting the timely publication of DC decisions: *Registrar v X*, [56]–[58] and [61].
(4) A permanent constraint on publication is a more stringent interference with open justice than a temporary one and requires stronger justification.
(5) Professional embarrassment and damage to professional reputations are not, *per se*, reasons to constrain open justice.
(6) Material which has been presented at public hearings should generally be available to the public.
(7) If a constraint is imposed on open justice, it ought ordinarily to be the least restrictive required in order to achieve its objective.
(8) It is submitted that, bearing in mind these principles, a permanent constraint on publication of a DC's adverse decision would only be granted, if at all, in rare or exceptional circumstances. That is *a fortiori* where the DC hearing itself has already been conducted in the public.
(9) Needless to say, the terms of any constraint on publication must be rational in terms of the objective pursued.

60. Mr Stock then contends that the Non-Publicity Order was made without proper reference to, and was inconsistent with the principle of open justice and the legislative intention of the PAO:

(1) The principles of open justice are not a matter of discretion but a matter of principle (constitutional right). See *Ng Shek Wai* at [88]. Counsel submits that it is not, therefore, a

question of the court substantially deferring to the DC's "discretion" on this point.

(2) The reason relied on by the DC to constrain publication was (apparently) the DC's conclusion that were strong mitigating factors and the penalty imposed should not be severe. However, it is submitted that this is not a valid or sufficient reason for permanently constraining publication, because a reader of the DC's Reasons will be informed of precisely what the DC found including the strong mitigating factors. The public interest favours publication of the true position in respect of adverse disciplinary findings, such that the public can make its own informed decision.

(3) The logic of the reasoning at (2) above is, presumably, that in all cases where there are strong mitigating factors or findings of "milder" infractions, publication will (or may) be constrained in some way. This represents a departure: (a) from the Institute's prevailing policy on publication, referred to in the context of publication in rule 33 of the Rules; and (b) it is submitted, from the legislative scheme and intention. The Registrar is concerned that the approach introduces a concept akin to private reprimand, which is novel in DC decisions and sits uneasily with the statutory intention including ss.35 and 38(2): see 2nd Affirmation of Donald Leo at paras.32 and 33.

(4) The DC Hearing was held in public with no application to be held in private. The facts and allegations made were already in the public domain. Prior to the hearing, the complaint would have been published on the Institute's website (with the respondents' identities) as would be the hearing schedule. The continuation of transparency favours publication of the result.

(5) There was nothing exceptional about this case so as to justify a constraint on publication; or to single out these respondents for special protection. Publication of the DC Reasons in full would not "frustrate the ultimate aim of doing justice".

(6) Further or alternatively, any legitimate interest in limiting publication was outweighed by the strong public interest features supporting publication in full.

(7) On any view, the terms of the Non-Publicity Order made were wholly irrational. There is simply no rational basis to constrain publication of only the sanction imposed by the DC. Even if protection of the Accountants' identities were a legitimate objective, the terms of the Non-Publicity Order do not achieve that objective.

C3.2 The DC's submissions

61. As mentioned above, the DC takes a neutral role in this application. But in relation to the above submissions, Mr Lau for the DC draws the court's attention to various matters which he says are relevant to the court's determination.

62. Mr Lau says it is clear, and has been held by the Court of Appeal in *Registrar v X* at [10]–[13] that the DC has the statutory power under r.11 of the Rules[37] to make an order that its decisions should not be published or that the publication should be made certain terms.

63. Counsel also submits that, for the following reasons, the authorities relied on by the Registrar for the proposition that the principles of open justice apply equally to disciplinary proceedings may have to be viewed with some caution.

64. First, Mr Lau emphasises that the following authorities are discussed in the context of court proceedings but not disciplinary proceedings:

(1) *Chao Pak Ki Raymund*: the applicants for judicial review applied for an anonymity order, restricting the publication of their name in the judicial review proceedings.
(2) *Asia Television Ltd*: X applied for the substantive appeal in the judicial review to be heard in camera.
(3) *Law Mei Mei*:[38] in the judicial review, the respondents issued a "Restricted Evidence Summons" seeking an order that (a) counsel shall not read out the contents of affidavit evidence at the substantive hearing; and (b) if the court's judgment contains the "Restricted Evidence", such judgment shall not be made available to the public.
(4) *R v Legal Aid Board, ex p Kaim Todner*: applicants for judicial review applied for prohibition of the disclosure of their identity.
(5) *R (Wilford)*: A party to judicial review was given the opportunity to apply to the court for an order that the judgment be published in a form that did not reveal his identity.

65. Second, in relation to those authorities which are in the context of non-court proceedings, Mr Lau suggests that whether

[37] Rule 11 provides: "The Chairman or the Disciplinary Committee may, in their discretion and at any stage of the proceedings, on request of the parties or on their own motion, dispense with or vary any of the requirements of these rules (including the procedural timetable) or make such directions for the conduct of the proceedings as they consider appropriate (including adjourning a hearing on specified terms as to costs)."

[38] Which is relied on by Mr Stock for the proper approach in the balancing exercise to be adopted by the relevant disciplinary tribunal under the principles of open justice. See [81] below.

the principles of open justice apply in disciplinary proceedings to the same extent as in judicial proceedings is either not fully argued or not so clear:

(1) The Court of Appeal in *Registrar v X* held at [13] that the DC has jurisdiction to prohibit the publication of its decisions or that publication should be made on certain terms.

(2) In *Ng Sek Wai*, although decided in the disciplinary context, it has to be noted that the Medical Council (the respondent in that case) *accepted* that the principle of open justice was engaged (see [66]). Hence, whether or not the principles of open justice should apply in disciplinary proceedings are therefore not argued.

(3) Similarly, in *Kennedy v Charity Commission* [2015] AC 455 (an authority referred to in *Ng Sek Wai*), where the judgment of a penal of seven also discussed the principles of open justice in the context of a journalist's request to the Charity Commission under the Freedom of Information Act for disclosure of information relating to statutory inquiries which it had carried out into the affairs of a charity. However, it should be noted that the court in that case did not have the advantage of full argument (see [234]). Further, it is pertinent to note Lord Carnwath's observations at [236]–[242] as follows:

> [236] I have no reason to doubt the authority of the Guardian News case itself as applied to the ordinary courts, with which it was concerned, … The cases to which Toulson LJ referred were about courts. *Although he treated the same principle as applying 'broadly speaking … to all tribunals exercising the judicial power of the state' (para 70), he gave no authority for that extension. Even assuming that wider proposition is correct, the Charity Commission cannot in my view be said to be 'exercising the judicial functions of the state'. … Although he categorises the latter as involving a 'quasi-judicial' function, he gives no further authority or explanation for the use of that somewhat imprecise and outmoded expression …*
>
> [237] *The Charity Commission is the creation of a modern statute, by which its functions and powers are precisely defined. …*
>
> [238] Furthermore, *such authority as there is points against any general presumption that 'open justice' principles applicable to the courts apply also to the various forms of statutory or non-statutory inquiry.* The issues in an analogous context were discussed in detail by the Divisional Court in *R (Persey) v Secretary of State for the Environment, Food and*

> *Rural Affairs* [2003] QB 794. The court upheld the Secretary of State's decision that the inquiries into the 2001 outbreaks of foot and mouth disease should be held in private. … the court held that there was no legal presumption that such an inquiry should be held in public: see also de Smith's Judicial Review, 7th ed (2013), para 1-104. *As Simon Brown LJ said [2003] QB 794, para 42: 'Inquiries, in short, come in all shapes and sizes and it would be wrong to suppose that a single model — a full-scale public inquiry — should be seen as the invariable panacea for all ills.'*
>
> [239] *The Charity Commission's powers similarly allow for inquiries 'in all shapes and sizes'*; … The Act lays down no relevant requirements as to the form of the inquiries, or as to the involvement of the public. *It has not been suggested that open justice principles require the inquiries themselves to be held in public, as would be the normal rule for courts.*
>
> …
>
> [241] *In my view there is nothing in the Guardian News case, or any other existing authority to support the view that common law principles relating to disclosure of documents in the courts can be transferred directly to inquiries. It must depend on the statutory or other legal framework within which the particular inquiry is established.* In the context of the Charities Act, *the particular form of publicity envisaged by the Act is the publication of a report under section 8, but the Commission is given a discretion as to its form.*
>
> [242] As has been seen, *I agree that the functions conferred by the* 1993 *Act*, sections 1B–1E, *not only give the Charity Commission powers to provide information* of the kind sought by Mr Kennedy, *but also give effect to a general principle of 'transparency'*. However, *principles of transparency need to be balanced against other policy issues peculiarly within the competence of the Commission, rather than the courts.* … (*Emphasis* added.)

66. Third, for *Disciplinary and Regulatory Proceedings*, although it was suggested that any order restraining publication of the normally reportable details of a case is a derogation from the principles of open justice, the comment was made in the context of request for anonymity.

67. Fourth, Mr Lau refers to the suggestion that the principle of open justice is protected by art.6(1) ECHR and "judgment shall be pronounced publicly" (at para.9.18), and that it is hard to see how a disciplinary tribunal could fulfil the purpose of art.6(1)

without pronouncing its judgment publicly (at para.9.21). However, counsel submits that in this regard, *Lam Siu Po* is apposite:

(1) Bokhary PJ observed that art.10 of the Bill of Rights (similar to art.6 of ECHR) "would not mandate publicity at such hearings or for their results": [19]. Besides, "an appeal to the courts where such an appeal is available, or judicial review by the courts where no such appeal is available, can supply any essential element such as independence or publicity that might otherwise be missing from a tribunal's arrangements": [21].
(2) Ribeiro PJ pointed out that while publicity is a highly important aspect of a fair trial, "this does not mean that there must be publicity at the original hearing or at every stage. Where the matter proceeds to a public hearing before a court of full jurisdiction, the protection against secret trials is achieved": [121]. Further, "at common law and in the absence of inconsistent legislative intervention, administrative and domestic tribunals are generally regarded as masters of their own procedure possessing a flexible discretion to take whatever procedural course may be dictated by the requirements of fairness": [138].

68. The above principles expounded in *Lam Siu Po* were applied by Jeremy Poon J (as he then was) in *Ng Man Yin v Registration of Persons Tribunal* [2014] 1 HKLRD 1188, [42] and [50]–[60]. His Lordship held at [51]:

> … a holistic approach has to be adopted. The entire determination process is to be viewed as a whole. Article 10 will be complied with if the process beginning with the administrative process is subject to control by a court of full jurisdiction to deal with the case as the nature of the decision requires, even if publicity is missing when the matter is dealt with by the administrative body or tribunal.

69. Mr Lau finally submits that in the present case, the following matters are relevant to whether or not the Non-Publicity Order was "unlawful":

(1) It was within the DC's powers to direct that the DC Order or DC Reasons should not be published: *Registrar v X*.
(2) There was no restriction on publishing the identity of the Accountants, their "convictions" and the reasons therefor. The Non-Publicity Order was limited in scope.
(3) The DC reasoned that it decided to take a "very lenient approach". It is trite that a disciplinary tribunal assesses the

> **seriousness of the findings and the measures that need to be imposed to reflect the same and to maintain the standard of the profession. Professional judgment and expertise are highly germane. The Court will give due weight to such professional judgment and expertise: *Registrar of the Hong Kong Institute of Certified Public Accountants v Cheung Yiu Hung* [2018] HKCA 463, [2018] HKEC 2134 at [25].**

D. Discussion

70. I agree with Mr Stock that it is plain that the principles of justice apply to the disciplinary proceedings envisaged under the PAO in regulating the accountancy profession. I will explain why.

71. First, properly construed in context, I am of the view that it is the objective intention of s.36(1A) of the PAO that disciplinary proceedings envisaged under the PAO are generally to be conducted consistently with the principles of open justice.

72. Section 36(1A) provides:

> Every hearing of the Disciplinary Committee *shall be held in public* unless the Disciplinary Committee —
>
> (a) on its own motion; or
> (b) on the application of —
>
> (i) the complainant; or
> (ii) the certified public accountant against whom the complaint is made,
>
> determines that *in the interests of justice* a hearing or any part thereof shall not be held in public in which case it may hold the hearing or the part thereof (as the case may be) in private. (*Emphasis* added.)

73. Hence, s.36(1A) of the PAO requires disciplinary proceedings generally to be held in public subject to the DC's discretion to do it otherwise in the interests of justice. As submitted by Mr Stock at [47] above, the amendment represented a change from the previous position that disciplinary proceedings were to be conducted by default in camera unless otherwise directed. The reasons for the proposed change were explained in the Bills Committee Report at paras.18–20 as follows:

> 18. Currently, there is no provision in the Ordinance as to whether the hearings of the Disciplinary Committee should be held in public or in camera, but HKSA's Disciplinary

> Committee Proceedings Rules, which are non-statutory rules, provide for hearings to be held in camera unless the Disciplinary Committee decides otherwise. Proposed section 36(1A) provides that every hearing of the Disciplinary Committee shall be held in public unless on its own motion or on application of the complainant or the certified professional accountant (CPA) concerned, the Disciplinary Committee determines that in the interests of justice a hearing or any part thereof shall not be held in public.
>
> 19. Concern has been raised by a member that public hearings may subject the CPA concerned to premature publicity and this may tarnish the reputation of an innocent CPA. HKSA advises that the proposal is supported by most HKSA members though some HKSA members did raise concern about the effect of premature publicity on the reputation of the CPA concerned and other related issues. *HKSA considers that the proposal is consistent with the community's expectation for greater transparency in HKSA's administration of quasi-judicial functions in respect of its members. The risk of premature publicity adversely affecting innocent members is no greater than the risk inherent in the publicity surrounding open court hearings. HKSA considers that professional accountants should not be treated differently from other members of the general public. Furthermore, opening the disciplinary proceedings to public scrutiny will also serve to protect the CPA concerned and is consistent with the spirit of the Hong Kong Bill of Rights Ordinance (Cap.383). Based on these considerations, the HKSA Council has decided to adopt the proposal for the hearings of the Disciplinary Committee to be held in public as a norm.*
>
> 20. While the Bills Committee supports HKSA's proposal, some members point out that the proposal should not be presumed as setting an example for other professions, as the holding of disciplinary hearings in public or camera for other professions may be subject to certain considerations that are not relevant to the accountancy profession. Hence, holding disciplinary hearings in public may not be an appropriate arrangement for some other professions. (*Emphasis* added.)

74. It is thus plain that the context underlying the enactment of s.36(1A) is to require disciplinary proceedings under the PAO to be conducted in line with the principles of open justice that are similar to those that apply generally in relation to court proceedings. In particular, it was explained that the change was necessary and justified as it was considered that:

(1) Disciplinary proceedings relate to the professional body's administration of "quasi-judicial functions" in regulating its members.
(2) The proposal is consistent with the public's expectation of greater transparency in these proceedings.
(3) Disciplinary proceedings are similar to open court hearings when considering the risk in premature publicity affecting innocent member.
(4) The adoption of open hearing for disciplinary proceedings for public scrutiny is consistent with the spirit of the HKBOR, which is obviously a reference to the open justice principles enshrined in art.10.

75. Construed in the above proper context, when s.36(1A) provides that every disciplinary proceedings are to be held in public (unless the DC determines that "the interests of justice" require a hearing or any part thereof to be private), it must be part of the objective intentions of the legislature that:

(1) The "interests of justice" to be considered by the DC should include the general principles of open justice for the benefit of the general public; and
(2) In so considering, the DC should bear in mind the importance of open justice given by the legislature to this provision, as the proceedings are by default to be held in open hearings to ensure transparency.

76. Second, as supported by the case law both in Hong Kong and the UK that Mr Stock has helpfully taken this Court to, as a matter of principle, there is also no reason why the principles of open justice should not apply equally to the disciplinary proceedings conducted under the PAO. This is particularly so as:

(1) The DC is exercising quasi-judicial power in conducting disciplinary proceedings. This is no good reason why such exercise should not be generally subject to the principles of open justice. See *Ng Sek Wai* at [59], [61], [66] and [88] as summarised at [53] above.
(2) Accountants play an important professional role and function in the society and are generally respected and entrusted by the public. There is thus a corresponding public interest to ensure their professionalism and integrity. In protecting the public interest, the mechanism of disciplinary proceedings is part of the important regimes enshrined in the PAO to hold the profession accountable to the public and be subject to public's scrutiny, which would in turn protect the profession's

own reputation and integrity as a whole. It is thus difficult to see why the general principles of open justice should not generally apply to these proceedings. See *Registrar v X* at [56]–[61] as summarised at [51(5) and (6)] above. This is indeed consistent with the professional body's own position as set out in the Bills Committee Report discussed above.

77. Mr Lau's submissions as summarised above with respect do not affect my above observations.

78. In relation to his submissions that the DC has jurisdiction under r.11 of the Rules to make these types of order (as held in *Registrar v X*), this has nothing to do with whether the principles of open justice should apply to disciplinary proceedings and should be taken into account when considering whether to make an order of such a nature. The fact that the DC has a discretion to make such an order goes to the question of the *practical* application of the principles to the particular case before it. As observed by Lord Toulson (with whom Lord Neuberger and Lord Clarke agreed) in *Kennedy* at [115] as follows:

> [115] The court held in Guardian News that the open justice principle applies, broadly speaking, to all tribunals exercising the judicial power of the state. (The same expression is used in section 32(4)(a) of the FOIA, which defines a court as including 'any tribunal or body exercising the judicial power of the state'.) The fundamental reasons for the open justice principle are of general application to any such body, *although its practical operation may vary according to the nature of the work of a particular judicial body*. (*Emphasis* added.)

79. Mr Lau has also submitted that I should view with caution the various authorities relied on by Mr Stock given their particular features or contexts as summarised in [64]–[68] above. I also do not think these will materially affect my conclusion that the general principles of open justice apply to disciplinary proceedings envisaged under the PAO. This is so as:

(1) In reaching the observation that the principles of open justice apply to disciplinary proceedings, the courts in these authorities have principally premised their analysis on the general quasi-judicial nature of these types of proceedings and the public interest in having these proceedings conducted openly. The soundness and propriety of such analysis based on first principles has nothing to do with and will not be affected by whether the particular questions concerned in those cases are

related to requests for anonymity or disclosure of certain information. The courts addressed those particular subject questions by applying the general principles of open justice to the specific issues in the case. See also Lord Toulson's observation in *Kennedy* as quoted in [78] above.

(2) The fact that the court in some of these cases made those observations on an uncontested basis or in the absence of full arguments similarly do not in my view weaken the propriety of the analysis. As I said above, the analysis is based on first principles. There is nothing Mr Lau has submitted which may show that the application of those principles in the analysis is incorrect. Further, both Mr Stock and Mr Lau also have not been able to identify any authorities to suggest that the principles of open justice should *not* apply to disciplinary proceedings.

(3) For the same reasons, I think Mr Lau's reference to *Lam Siu Po* and submissions that the court should be cautious in considering the extent and scope of the principles of open justice that are applicable to disciplinary proceedings are answered by Lord Toulson's observation as quoted above. The principles do apply generally but their *practical* application are of course dependent upon the individual and factual circumstances of each case.

(4) In any event, for the present purpose, insofar as for the disciplinary proceedings envisaged under the PAO are concerned, for the reasons I have explained above, as a matter of statutory construction, it is clear to me that their conduct is intended to be subject to the principles of open justice.

80. I therefore conclude that the general principles of open justice (as summarised in *ATV v Communications Authority*) do apply to the disciplinary proceedings held pursuant to the PAO. As such, the DC in conducting the disciplinary proceedings should in the relevant circumstances take into account these principles and give sufficient weight to them in view of the legislative intention that the conduct of the disciplinary proceedings shall generally comply with the notion of open justice and transparency.

81. There is no dispute that an order in the nature of the Non-Publicity Order is *prima facie* inconsistent with open justice. See [51(5)] above. In the premises, when the DC has to consider whether to exercise its jurisdiction to make such an order, it should take into account these principles as relevant consideration, and give them sufficient weight (bearing in mind that the default emphasis is in favour of maintaining open justice) to see if there are particular circumstances in the interests of justice to justify the making of such an order. As observed by Chow J in *Law Mei Mei v Airport*

Authority at [42]: "… any deviation from the principle of open justice must be properly justified. Whenever the court is being asked to deviate from this fundamental principle, it has to carry out a balancing exercise which, I consider, ought to carry a heavy tilt in favour of maintaining open justice".

82. In the present case, the DC when stating its sanction against the Accountants and making Non-Publicity Order has stated the following in the DC Reasons at paras.6.1–6.2:

> 6. Conclusion
> 6.1 The Committee concludes that the complaint against the Respondents substantiated.
> 6.2 However, the Committee is of the view that there are strong mitigating factors in this case:
>
> (a) this is not a case where the Respondents had been oblivious of the existence of HKAS 39. In fact, the Respondents' had duly carried out its evaluation of Heng Tai's impairment assessment by having:
>
> (i) duly noted the necessity of performing the impairment review;
> (ii) duly set out the approach in working progress;
> (iii) duly noticed the decline in the value of China Zenith shares; and
> (iv) duly assessed the reliability of the published share price by performing tests and performed alternative bases of valuation.
>
> (b) The Respondents had committed an error of judgment and came to the wrong conclusion when performing audit on the Financial Statements, The Respondents' such wrong conclusion had largely been contributed by the lack of authoritative interpretation and diversity in practices as regards HKAS 39. The Institute could have been more proactive at the material time by issuing guidelines and practice notes. If the Institute was not yet ready for the implementation of HKAS 39 back then, it should have postponed the adoption of HKAS 39.
> (c) The Committee is also mindful that the decline in fair value of the China Zenith shares, though not recognised in profit and loss, had been reflected as change in fair value of available-for-sale financial assets on page 37 of the 2009 Annual Report of Heng Tai.

> The basis for not making an impairment was also stated in paragraph 4(j) of the notes to the Financial Statements on page 58 of the 2009 Annual Report. The decline in value was not realised losses. Indeed, in the overall context of Heng Tai's financial position as at 30 June 2009 and consolidated profit for the year ended 30 June 2009 the impact of such decline in value could not be said to be substantial. The Committee takes the view that it is unlikely that any investors would have suffered a loss as a result of this non-complying accounting treatment.
>
> (d) In the circumstances, the Committee takes a very lenient approach on the matter and has decided to mete out only a penalty of HK$20,000 (i.e. HK$10,000 on each Respondent) as sanction. The Committee would further direct that no publicity of the sanction should be made.

83. Apparently, the DC decided to make the Non-Publicity Order because of the strong mitigating circumstances relating to the Accountants' conviction as explained in this part of the reasons.

84. In light of these reasons, I agree with Mr Stock that the Non-Publicity Order is made unlawfully.

85. First, in making the Non-Publicity Order, the DC had not given any consideration (let alone giving due weight) to the principles of open justice. The DC had therefore erred in principle as it had failed to take into account a relevant consideration and to engage itself in the requisite balancing exercise to see if there are strong countervailing factors that, in the interests of justice, would weigh against the heavy tilt towards maintaining open justice.

86. Second, I agree that the order is irrational: the Non-Publicity Order is intended only to prohibit the publication of the sanction made against the Accountants but *not* their identity. However, as stated in the DC Reasons, the DC imposed a very light sentence against the Accountants because of the strong mitigating circumstances of the case. In the circumstances, precisely to underline those strong mitigation circumstances in favour of the Accountants, any objective person in the position of the DC would have also published the light sanction imposed against them together with the publication of their names and the convictions in light of the principles of open justice. This is indeed the position taken by the Accountants themselves (see [22] above). In the premises, unless further explained in the DC Reasons (which is absent), the Non-Publicity Order on its face is made without proper basis and is irrational.

E. Conclusion

87. I will therefore quash the Non-Publicity Order on the basis that the DC had erred in principle in making it, and that it is in any event irrational for the reasons explained above.

88. Mr Stock has indicated that the Registrar would not ask for any costs in this application if he is successful. I will therefore make no order as to costs.

89. Lastly, I thank counsel for their assistance in the matter.

Reported by Kemal Bokhary