

NEW ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS ACT 1996

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

AND

IN THE MATTER of **John Edward Fokerd**, Suspended Chartered Accountant, of **Wellington**

**DETERMINATION OF THE DISCIPLINARY TRIBUNAL OF THE NEW ZEALAND
INSTITUTE OF CHARTERED ACCOUNTANTS
20 December 2019**

Hearing: 12 December 2019

Location: The offices of Chartered Accountants Australia and New Zealand, Level 7, Chartered Accountants House, 50 Customhouse Quay, Wellington, New Zealand

Tribunal: Mr MJ Whale FCA (Chairman)
Mr DJH Barker FCA
Mr N De Frere CA
Ms B Gibson (Lay member)

Legal Assessor: Mr David Laurenson QC

Counsel: Mr Richard Moon for the prosecution

Tribunal Secretariat: Janene Hick
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At a hearing of the Disciplinary Tribunal held in public at which the Member was in attendance and not represented by counsel, the Member admitted the particulars and pleaded guilty to all charges.

The charges and particulars as laid were as follows:

CHARGES

THAT in terms of the New Zealand Institute of Chartered Accountants Act 1996 and the Rules made thereunder, and in particular Rule 13.50¹ the Member is guilty of:

- 1) Misconduct in a professional capacity; and/or
- 2) Conduct unbecoming an accountant; and/or
- 3) Breaching the Rules and/or the Code of Ethics.

PARTICULARS

IN THAT

While being a Chartered Accountant in Public Practice and/or accountant and/or trustee of the X Trust, the Member:

- (1) Misappropriated monies belonging to X Trust, in particular between 1 June 2012 and 27 February 2018 on at least 146 occasions transferred funds exceeding \$650,000 from X Trust's bank accounts into accounts which the Member owned or controlled without the knowledge and/or consent of X Trust and/or the Member's fellow trustees, in breach of the Fundamental Principles of Integrity and/or Professional Behaviour of the Code of Ethics 2003 and/or 2014 and/or 2017² and/or paragraphs 110.1 and/or 150.1 and/or 270.1 and/or 270.2 of the Code of Ethics 2014 and/or 2017 and/or paragraphs 10 and/or 11 and/or 12 and/or 48 of PS-2 *Client Monies*; and/or
- (2) Between 2012 and 2018 prepared financial reports for X Trust and/or its Board which on at least 14 occasions included materially false and/or misleading statements and/or which omitted and/or obscured relevant information, in that the reports included reference to monies or balances held in a bank account referred to as the "90" account, when there were no such account and/or no funds held to the credit of X Trust and/or the balances represented monies the Member had misappropriated from X Trust, in breach of the Fundamental Principles of Integrity and/or Professional Behaviour and/or Rule 2 and/or paragraphs 24 and/or 25 of the Code of Ethics 2003 and/or the Fundamental Principles of Integrity and/or Professional Behaviour and/or paragraphs 110.1 and/or 110.2 of the Code of Ethics 2014 and/or the Code of Ethics 2017.

¹ Formerly Rule 13.39 of NZICA's Rules effective 15 December 2014 to 29 May 2019

² The 2003 Code of Ethics is applicable to conduct that occurred from 1 July 2003 to 31 December 2013, the 2014 Code of Ethics is applicable to conduct that occurred from 1 January 2014 to 14 July 2017 and the 2017 Code of Ethics is applicable to conduct that occurred from 15 July 2017 to 14 June 2019.

DECISION

On 11 December 2018, the Member was suspended until further order of the Disciplinary Tribunal on the grounds that it was desirable to do so having regard to the interests of the public and the financial interests of any person.

The Tribunal notes that Charges 1 and 2 are laid in the alternative.

The Tribunal is satisfied on the evidence before it that the particulars, which the Member has admitted, have been made out and that Charges 1 (the more serious of the alternative Charges) and 3, which the Member has accepted, are established.

The evidence included a report from an independent forensic accountant which described the misappropriation of funds as including 146 separate transactions over a 6-year period totalling at least \$679,425. In addition, the report identified 28 repayment transactions undertaken by the Member which, intentionally or otherwise, helped to conceal the misappropriation. The misappropriation was further exacerbated by the Member's preparation of false and misleading financial statements for the X Trust for the years ended 2012 to 2018 which were intended to further conceal the Members' actions. These factual findings were admitted by the Member.

The independent forensic accountant's report concluded by noting that he had been unable to obtain sufficient evidence to support the Member's assertion that all misappropriated funds had been repaid. However, based on responses to questioning of the independent forensic accountant by members of the Tribunal, the Tribunal finds that it is probable that all of the misappropriated funds have subsequently been repaid by the Member.

However, conduct of this type goes to the heart of the fundamental obligations of integrity and honesty and clearly constitutes misconduct in a professional capacity.

PENALTY

The PCC sought the removal of the Member's name from the Institute's Register of Members.

The PCC drew the Tribunal's attention to the 8 factors noted in the *Roberts* decision. In *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354, the Court identified the following factors as being relevant where tribunals are determining penalty. They are, which penalty:

- Most appropriately protects the public and deters others;
- Facilitates the Tribunal's important role in setting professional standards;
- Punishes the practitioner (although Courts have subsequently taken the view that punishment is more a consequence of the other factors);
- Allows for the rehabilitation of the practitioner where appropriate;
- Promotes consistency with penalties in similar cases;
- Reflects the seriousness of the misconduct;
- Is the least restrictive penalty appropriate in the circumstances; and
- Looked at overall, is the penalty which is fair, reasonable and proportionate in the circumstances.

The PCC also drew the Tribunal's attention to 2 previous Tribunal decisions, being *Sandhiya Sharma* (18 January 2019) and *Tracey Anne Milne* (6 June 2018). In both cases the members had misappropriated funds from their respective employers. Notwithstanding the repayment of the misappropriated funds in both cases, Milne had her name removed from the Institute's register of members while Sharma would have had her name removed from the Institute's register of members if she had still been a member.

While the Tribunal's view is that it is probable that the funds have been fully repaid by the Member, the Tribunal notes that the misappropriation of funds in these circumstances represents a gross breach of trust and is, in virtually every case, incompatible with membership of the Institute. In this particular case, the Tribunal notes that notwithstanding the Member's unblemished record over his many years of membership, the misappropriation involved a significant number of transactions undertaken over an extended period which the Member concealed through the provision of false or misleading financial statements for the Trust.

Pursuant to Rule 13.51(a) of the Rules of the New Zealand Institute of Chartered Accountants, the Disciplinary Tribunal orders that JOHN EDWARD FOKERD'S membership of the Institute be terminated and that his name be removed from the Register of Members.

COSTS

The Professional Conduct Committee seeks full costs of \$29,823, noting that the costs amount includes those pertaining to the interim suspension order, which were reserved at the time, and the investigator's fee.

The Member submitted that he is now destitute, having sold his family home to repay the funds. The Member also submitted that due to the fact that he has no other skills and as the Inland Revenue Department had removed his tax agency following earlier publicity surrounding the case, he has little prospect of being able to repay any costs. The Tribunal notes that the Member provided no evidence to support his submission.

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

The Tribunal considers an award of \$29,000 is fair and reasonable in the circumstances. It notes that the Institute is generally prepared to negotiate instalment payment arrangements where appropriate.

Pursuant to Rule 13.53 of the Rules of the New Zealand Institute of Chartered Accountants the Disciplinary Tribunal orders that the Member pay to the Institute the sum of \$29,000 in respect of the costs and expenses of the hearing before the Disciplinary Tribunal and the investigation by the Professional Conduct Committee. No GST is payable.

SUPPRESSION ORDERS

Pursuant to Rule 13.78 of the Rules of the New Zealand Institute of Chartered Accountants the Disciplinary Tribunal orders that the names of all third parties, and any evidence or other information which might identify them, be suppressed.

PUBLICATION

The PCC is seeking publication of this decision on the Institute's website, in the *Acuity* magazine and in the *Dominion Post*, with reference to the Member's name and location. The PCC submitted that the publication of the Tribunal's Decision in the Member's local newspaper was appropriate in light of the fact that the interim suspension order was published in the *Dominion Post* at the time.

The Member sought name suppression and submitted that publication was highly prejudicial and is likely to exacerbate the health condition of one of the Member's direct family members, although the Member did not provide evidence to support this submission.

The Tribunal finds that the 'exceptional circumstances' test in Rule 13.51 for non-publication on the Institute's website and in the *Acuity* magazine has not been met. In addition, in light of the earlier publication of the interim suspension order, the Tribunal finds that the publication in the Member's local newspaper is appropriate to protect the public interest and the interests of the profession.

In accordance with Rule 13.55 of the Rules of the New Zealand Institute of Chartered Accountants the decision of the Disciplinary Tribunal shall be published on Chartered Accountants Australia and New Zealand's website, in the official publication *Acuity* and in the *Dominion Post*, with mention of the Member's name and locality.

RIGHT OF APPEAL

Pursuant to Rule 13.63 of the Rules of the New Zealand Institute of Chartered Accountants, the parties may, not later than 21 days after the notification to the parties of this Tribunal's exercise of its powers, appeal in writing to the Appeals Council of the Institute against the decision.

No decision other than the direction as to publicity and the suppression orders shall take effect while the parties remain entitled to appeal, or while any such appeal by the parties awaits determination by the Appeals Council.

A handwritten signature in black ink, appearing to read 'MJ Whale', with a stylized flourish at the end.

MJ Whale FCA
Chairman
Disciplinary Tribunal