

Determination of the Disciplinary Tribunal of Chartered Accountants Australia and New Zealand 21 August 2019

Case Number: D-1202

Member: Ian Duff Stewart CA of Victoria

Hearing Date: 1 August 2019

Tribunal: Ross Gavin FCA (Chair)
David Gibbs FCA
Jenni Millbank, lay member of the Tribunal

Tribunal Legal Adviser: Jamesina McLeod

Representation: Paul Forbes for the Professional Conduct Committee (PCC)
The Member did not appear and was not required to attend the hearing

Case description:

1. Member found by the Federal Court of Australia to have acted dishonestly.
2. Member subject of adverse and unfavourable findings in relation to the Member's professional or business conduct, competence and integrity by the Federal Court of Australia.
3. Member has committed acts, omissions or defaults which have brought discredit upon the Member, Chartered Accountants ANZ and the profession of accountancy.

1. BACKGROUND

- The Member and the PCC reached an agreement as to sanctions (**Agreement**) which annexed a Statement of Agreed Facts (**Agreed Facts**).
- The Agreement did not provide that the Member admitted the allegations or that the Tribunal was to make any determination as to breach in the terms of the By-Laws. At the hearing the Tribunal addressed the PCC on this issue and expressed dissatisfaction at the request that the Tribunal impose the serious sanction of termination of membership without having made findings as to breach. The Tribunal was further concerned that the Agreed Facts did not address allegation 3. In order to afford procedural fairness to the Member and determine proceedings as efficiently as possible, at the request of the Tribunal the PCC made contact with the legal representatives of the Member to determine his position on whether further submissions on this issue were required.
- On the day of the hearing the Member, through his legal representatives, confirmed in writing that he admitted all of the allegations.

2. EVIDENCE IN BRIEF

- The Agreed Facts were:

12.09.1978	[The Member] becomes a member of Chartered Accountants ANZ
2012	Neville's Bus Service Pty Limited (NBS), trading as Busabout, engaged Pitcher Partners to prepare tender documents for Transport for NSW, which was ultimately accepted. In doing so, an amortisation error was made which Pitcher Partners ultimately conceded was the product of negligence, in breach of contract and in contravention of section 18 of the Australian Consumer Law
21.12.2018	The Federal Court of Australia found in <i>Neville's Bus Service Pty Ltd v Pitcher Partners Consulting Pty Ltd & Ors</i> [2018] FCA 2098 that: <ol style="list-style-type: none"> a) [the Member's] evidence was untruthful and evasive (paragraphs 113-115, 178-179, 181, 183 and pages 52-59, 81-85) b) [the Member] acted dishonestly
21.12.2018	The Court ordered that NBS was entitled to \$5,485,416.00 from Pitcher Partners, Pitcher Partners Consulting Pty Ltd and [the Member] as "damages for deceit"
21.02.2019	On 21 February 2019, the Court awarded NBS a further lump sum by way of costs in the amount of \$3,366,388.00
Current	[The Member] has co-operated fully with CA ANZ's investigation and he has no previously recorded disciplinary history.
- The Agreement contained the following terms:

The Member and the Professional Conduct Committee of Chartered Accountants ANZ consent to the Disciplinary Tribunal of Chartered Accountants ANZ dispensing with the procedures in By-Law 40(10) of the By-Laws of Chartered Accountants ANZ in relation to complaint D-1202 made against the Member and proceeding directly to the imposition of sanctions on the following terms:

 1. The Professional Conduct Committee will appear at the scheduled hearing of the matter at 9:30AM on 1 August 2019. The Member will not be required to attend the hearing.
 2. The Professional Conduct Committee will present to the Disciplinary Tribunal a signed copy of this Agreement including the annexed Agreed Statement of Facts.
 3. The Disciplinary Tribunal may determine the matter without further submissions or evidence being required from either the Professional Conduct Committee or the Member and impose the following sanctions:
 - (a) [the Member's] membership is terminated effective from 1 August 2019.

- (b) The Disciplinary Tribunal will publish its decision on the Chartered Accountants ANZ website and in Acuity, mentioning [the Member's] name and locality.
 - (c) The Disciplinary Tribunal will notify its decision to any bodies with whom [the Member] holds a professional registration or membership.
 - (d) [The Member] will pay a contribution to Chartered Accountants ANZ of \$8,000.00 towards the costs and expenses of the disciplinary action.
4. If the Disciplinary Tribunal is not prepared to dispense with the procedures in By-Law 40(10) on the terms above then the Member and the Professional Conduct Committee will jointly seek and consent to the hearing of the complaint being adjourned for a period of not less than 14 days.

3. DECISIONS ABOUT THE PCC'S ALLEGATIONS WHICH ARE SET OUT IN FULL IN SCHEDULE 1

- On the day of the hearing the Member, through his legal representative, stated in writing:
 - + [The Member] admits each of the allegations contained in the Notice of Disciplinary Action dated 29 June 2019.
 - + Unless requested by the Tribunal, [the Member] does not seek to appear at or be heard by the Tribunal on this matter.
 - + In admitting these allegations, [the Member's] position is that the agreed statement of facts are to the effect that he accepts that the Court made the findings that it did. [The Member] does not agree with those findings and did not concede those matters in the stand (and under cross-examination). However, the Court did not accept [the Member's] evidence given during that hearing. Notwithstanding that he does not agree with those findings, our client is respectful of the findings of the Court.
 - + Finally, and for the avoidance of any doubt, regarding the allegation that the findings of the Court in relation to [the Member] could cause embarrassment to the profession of accountants, or lead the profession into disrepute, [the Member] accepts that as being a potential consequence of the judgment of the Federal Court of Australia, which is the subject of the Notice of Disciplinary Action.
- The Tribunal was satisfied that the Agreed Facts and the PCC's casefile, including the published decisions of the Court, established allegations 1 and 2.
- The decision in *Neville's Bus Service Pty Ltd v Pitcher Partners Consulting Pty Ltd & Ors* [2018] FCA 2098 contained:
 - findings that the Member had acted dishonestly, in breach of By-Law 40(2.1)(c)
 - adverse and unfavourable findings in relation to the Member's professional and business conduct, in breach of By-Law 40(2.1)(e).
- With respect to allegation 3, the Tribunal determined that the Member had brought discredit upon himself, Chartered Accountants ANZ and the profession of accountancy because:
 - the Member's evidence as determined by the Court was untruthful and evasive
 - the Member's conduct was determined by the Court to be negligent and deceitful
 - the Court determined that the Member had acted dishonestly
 - there was extensive media reporting of the Court proceedings and findings over a period of more than a year.

The Member also admitted this allegation.

4. DECISION ABOUT SANCTIONS

- The Tribunal determined that the appropriate sanction in these circumstances was to terminate the Member's membership effective from 1 August 2019 and to remove the Member's name from the Registers on which it appears.

- The Tribunal was satisfied that the Agreement which contained a termination of the Member's membership was appropriate because of:
 - the seriousness of the Member's conduct
 - the seniority and experience of the Member
 - the length of time over which the conduct occurred, as found by the Court
 - the need to maintain public confidence in the profession
 - the need to signal to the profession of accountancy the necessity of maintaining high standards of skill, professionalism and integrity.
- The Tribunal had regard to the mitigating circumstances in the Agreed Facts, in particular that there was no previous disciplinary history and that the Member had cooperated with the Chartered Accountants ANZ disciplinary process.
- The Tribunal also determined that the Member should pay \$8,000 towards the costs and expenses of the disciplinary action as agreed by the Member in the Agreement, as an agreed sanction. The Tribunal formed the view, having regard to Regulation CR8 - *Disciplinary Procedures*, that the quantum of costs was reasonable in the circumstances of this matter as noted in this decision.

5. DECISION ABOUT PUBLICATION

In accordance with By-Laws 40(12.3) and 40(12.4), the Tribunal directed that:

- its decision with reasons, mentioning the Member's name and locality, be published on the website of Chartered Accountants ANZ (the **Published Decision**)
- a notice mentioning the Member's name and locality with a web address for the Published Decision be published in the Chartered Accountants ANZ digital and print magazine "Acuity".

6. NOTIFICATION TO OTHER BODIES

The Tribunal was informed that the Member holds no current registrations or memberships and the Tribunal determined not to notify any bodies of this decision.

7. RIGHT OF APPEAL

The Member may, within 21 days after the notification of the written decision with reasons to the Member of this Tribunal's decision, appeal in writing to the Appeals Tribunal of Chartered Accountants ANZ against the decision (By-Law 40(11.1)).

The PCC may, within 21 days after notification of the written decision with reasons to the PCC of this Tribunal's decision, appeal in writing to the Appeals Tribunal of Chartered Accountants ANZ against the decision (By-Law 40(11.2)).

Save for termination of the Member's membership which is effective from 1 August 2019, the date of effect of this decision is the day immediately after the expiry of the period during which an appeal may be notified, if no appeal has been notified within that period (By-Law 40(10.18)).

8. CHANGES TO CHARTERED ACCOUNTANTS ANZ CONSTITUTION

- On 12 August 2019, the Tribunal was informed that the Governor-General had approved a new Supplemental Charter and By-Laws, effective 30 July 2019.
- At the time of hearing this matter the Tribunal was not aware that the Governor-General had approved the new By-Laws, however the Tribunal had been provided with a copy of

a letter sent from the PCC to the Member dated 25 July 2019. The PCC's letter noted that constitutional documents were with the Governor-General for approval and that those documents would become effective on approval by the Governor-General. The PCC's letter relevantly stated:

"If the amended By-Laws are approved before [the Member's] Disciplinary Tribunal hearing, the amended By-Laws will be the relevant By-Laws for the purpose of the hearing. With respect to notice requirements, the Professional Conduct Committee's position is that the notice requirements in the new By-Laws will only apply to matters that are set down for hearing after the new By-Laws take effect and, if necessary, will make that submission to the Disciplinary Tribunal at the hearing. Please advise if you intend to take issue with that position".

- As at the time of publication of this written decision, the Tribunal has not been provided with any communication from the Member which objects to the PCC's position. The Tribunal is of the view that the relevant notice provisions under which the Member received the Notice of Disciplinary Action were those in force at the time of service, and that the subsequent approval of new notice provisions does not affect this matter.
- The Tribunal notes that the new By-Laws do not alter the availability or effect of the sanctions considered and ultimately determined in this matter, and so the Tribunal's decisions as to sanctions are not affected by the commencement of the new By-Laws.



**Chair
Disciplinary Tribunal**

SCHEDULE 1 - THE PCC'S ALLEGATIONS

It is alleged that while a member of Chartered Accountants Australia and New Zealand (**CA ANZ**) the Member is liable to disciplinary action in accordance with:

1. By-Law 40(2.1)(c) in that the Federal Court of Australia in *Neville's Bus Service Pty Ltd v Pitcher Consulting Pty Ltd* [2018] FCA 2098 found that the Member acted dishonestly by his conduct:
 - (a) in concealing an error from a client; and
 - (b) as an unsatisfactory witness who evaded questions during examination, sought to conceal the error and deflect responsibility for it.
2. By-Law 40(2.1)(e) in that the Member was the subject of adverse or unfavourable findings by a court of law in relation to his professional and business conduct, competence and integrity, as set out in *Neville's Bus Service Pty Ltd v Pitcher Consulting Pty Ltd* [2018] FCA 2098.
3. By-Law 40(2.1)(k), in that the acts, omissions and defaults as set out in paragraph 1 to 2 above bring, or may bring, discredit on the Member, CA ANZ and/or the profession of accountancy.

SCHEDULE 2 - RELEVANT BY-LAWS

40. Except as provided by By-Law 41, the By-Laws in this Section 5, including the following paragraphs of this By-Law 40, do not apply to Members who are also members of NZICA in respect of disciplinary matters over which NZICA has jurisdiction and which relate to the practice of the profession of accountancy by NZICA's members in New Zealand. Nothing in this By-Law 40 excludes from the operation of this Section 5, conduct of a Member:

- (a) who was, but is no longer, a member of NZICA; or
- (b) who has subsequently also become a member of NZICA.

Except as provided by By-Law 41, no Member shall be sanctioned under both this Section 5 and NZICA Rule 13 in respect of the same conduct.

...

40(2) **Disciplinary action**

40(2.1) A Member is liable to disciplinary sanctions under these By-Laws if (whether before or after the date of adoption of this By-Law) that Member:

...

- (c) has in any civil proceedings before any court of law, tribunal or similar body in any jurisdiction in Australia or elsewhere been found to have acted dishonestly (provided such finding has not been entirely set aside on appeal);

...

- (e) has been the subject of an adverse or unfavourable finding in relation to that Member's professional or business conduct, competence or integrity by any court of law, professional body, royal commission, statutory authority, regulatory authority, statutory body, commission or inquiry in any jurisdiction in Australia or elsewhere;

...

- (k) has committed any act, omission or default which, in the opinion of the Professional Conduct Committee, Disciplinary Tribunal or Appeals Tribunal brings, or may bring, discredit upon that Member, CA ANZ or the profession of accountancy; or

...

40(10.13) Subject to paragraph 9.3(c), the Disciplinary Tribunal may, with the written consent of the relevant Member and the Professional Conduct Committee, dispense with any or all of the procedures in this paragraph 10 and impose any of the sanctions permitted in paragraph 10.12 or accept a written undertaking under paragraph 13.8.