

# Determination of the Disciplinary Tribunal of Chartered Accountants Australia and New Zealand 29 August 2018

**Case Number:** D-1187

**Member:** David John Leigh CA of Qld

**Hearing Date:** 22 August 2018

**Tribunal:** David Fairlie (Chair)  
Richard Rassi FCA  
Ross Gavin FCA

**Tribunal Legal Adviser:** Lauren Stewart

**Representation:** Andrew Emmerson for the Professional Conduct Committee (PCC)  
The Member neither appeared nor was represented at the hearing

**Case description:** Member suspended on an interim basis

## 1. DECISIONS

### 1.1 DECISION ABOUT THE PCC'S APPLICATION WHICH IS SET OUT IN FULL IN SCHEDULE 1

At a hearing of the Disciplinary Tribunal not attended by the Member, the Tribunal determined that the Member be suspended from membership of Chartered Accountants ANZ on an interim basis until the earlier of:

- (a) three months after the full and final resolution of the later of:
  - i. all civil and criminal proceedings against him; and
  - ii. all regulatory investigations into his conduct; or
- (b) further investigation and determination of the complaints arising from the matters referred to in allegations 1 – 6 of the amended Notice of Disciplinary Action.

For the period of interim suspension:

- the Member's name will be removed from the Registers on which it appears;
- the Member loses the rights and privileges of membership;
- the Member must surrender his certificate of membership, any certificate of public practice and any other accreditation, specialisation or other certificate or award held by the Member;
- the Member will remain subject to disciplinary processes and sanctions as if still a member.

### 1.2 DECISION ABOUT COSTS SANCTION

Costs are to be reserved until the final determination of the complaint against the Member.

### 1.3 DECISION ABOUT PUBLICATION

This decision will not take effect while the Member remains entitled to appeal.

In accordance with paragraphs 12.3 and 12.4 of By-Law 40, 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".

### 1.4 NOTIFICATION TO OTHER BODIES

The Member holds registrations and/or memberships with the following bodies, which will be notified of this decision:

- Australian Restructuring Insolvency and Turnaround Association
- Australian Securities and Investments Commission
- Australian Financial Security Authority.

## 2. RIGHT OF APPEAL

The Member may, within 14 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 (paragraphs 9.4 and 11.1 of By-Law 40).

While the Member remains entitled to appeal, or while any such appeal by the Member awaits determination by the Appeals Tribunal, the following decisions shall not take effect:

- Decision about the PCC's application for interim suspension
- Decision about costs sanction.

The PCC may, within 14 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 (paragraphs 9.4 and 11.2 of By-Law 40).

## 3. BACKGROUND

In October 2010 the Member was appointed as joint and several liquidator of Neolido Holdings Pty Ltd ACN 102 472 015 (in Liquidation) (**Neolido**), while a partner of PPB Advisory.

In February 2018 the second joint and several liquidator of Neolido (the **Complainant**) was notified by a secured creditor of Neolido that a fraud may have taken place. The Complainant subsequently lodged a complaint with Chartered Accountants ANZ which stated that the Member as liquidator had authorised payments in the sum of \$800,000 to an unauthorised bank account in the Member's control.

The complaint was investigated by the PCC and formed the basis of their application for interim suspension brought to the Tribunal.

## 4. REASONS FOR DECISION ON INTERIM SUSPENSION

### Submissions from the PCC

- The PCC submitted that:
  - interim suspensions operate as a protective jurisdiction of the Tribunal pursuant to By-Law 40(9.1). That protective power is necessarily engaged in circumstances where there may be contested allegations and facts yet to be finally determined or admitted. An application for an interim suspension is not a matter where the Tribunal is asked to make any findings of fact in respect of the underlying allegations, nor any determination of guilt or innocence of the member in question. The Tribunal can proceed however on the limited evidence before it with reference to the broader protective policy and all relevant factors which make it necessary or desirable for the Tribunal to suspend a member on an interim basis
  - By-Law 40(9.1) requires only one of the following factors to be met for an interim suspension order to be made:
    - the urgency of the matter
    - the interests of the public
    - the reputation of Chartered Accountants ANZ
    - the integrity of the profession of accounting.
  - In the view of the PCC each of these factors has been satisfied and it was therefore necessary and desirable that the Member be suspended on an interim basis. Specifically:

- the matter was urgent because it had been six months since the serious allegations were made in public concerning the Member's conduct and freezing orders against the Member's assets were put in place by the Supreme Court of Queensland. It is critical for Chartered Accountants ANZ's reputation that it be seen to act promptly in response to these events
- for the second, third and fourth factors the following matters are relevant:
  - \* in the decision *Re ACN 008 664 257 Pty Ltd (in liq)* [2004] 49 ACSR 443 the Court held
    - “[35] A court-appointed liquidator occupies a fiduciary position with respect to his or her administration of the assets of the company in liquidation...”
    - “[44] By parity of reasoning, a court-appointed liquidator has a general duty to the court to avoid anything that would or might compromise his or her impartiality, which implies a duty not to deal with the company's assets for his or her own benefit, or otherwise place himself or herself in a position of actual or possible conflict between personal interest and the duties of office. The court-appointed liquidator's duty is at least as strong as the lawyer's, and might even be stronger, having regard to the quasi-judicial functions that a liquidator is expected to perform...”
  - \* the Member, as an officer of the company, had obligations to comply with sections 180 - 184 of the *Corporations Act 2001* (Cth) which required the Member not to improperly use his position and imposed fiduciary duties of care and diligence on the Member
  - \* the allegations made against the Member are serious allegations of fraud and accordingly it is in the public interest for the Member not to hold himself out as a member of Chartered Accountants ANZ until the allegations are finally determined
  - \* the public should be entitled to expect that members of Chartered Accountants ANZ are beyond reproach in terms of their integrity, professionalism and honesty. The Member's continuing membership of Chartered Accountants ANZ risks eroding that public trust and confidence

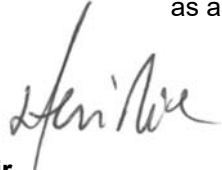
#### **Submissions from the Member**

- The Member consented in writing to the application for interim suspension, made no submissions and stated that he would not be attending the hearing.

#### **Tribunal's decision**

- The matters which the Tribunal must take into account in determining an application for interim suspension are set out at By-Law 40(9.1) which states:
  - “...if the Disciplinary Tribunal is satisfied that it is necessary or desirable to do so, having regard to the urgency of the matter, the interests of the public, the reputation of CA ANZ, or the integrity of the profession of accounting, the Disciplinary Tribunal may suspend the Member from Membership of CA ANZ on an interim basis pending further investigation and determination of the complaint”.
- The Tribunal accepted the Member's presumption of innocence and that it was not the Tribunal's role to consider, or to turn its mind to, whether the Member was guilty of the alleged offences.
- The Tribunal was satisfied, having regard to each of the factors of By-Law 40(9.1), that it was “necessary and desirable” to suspend the Member on an interim basis (as set out in paragraph 1.1 above) because:

- the Member's alleged conduct constitutes a fundamental and gross breach of trust
- it is necessary to take prompt action to protect the reputation of Chartered Accountants ANZ and more broadly, the professional body of accounting, due to the potential impact of the allegations
- there is the potential for further criminal or civil proceedings to flow from the allegations and any such proceedings may result in adverse media coverage, and again put at risk the reputation of Chartered Accountants ANZ and the broader profession of accountancy
- the public are entitled to expect, given the nature of the allegations, that the Member would be suspended on an interim basis or else confidence in the profession will be eroded if the Member was allowed to continue to hold himself out as a member of Chartered Accountants ANZ.

A handwritten signature in black ink, appearing to read "S. Penrose", written in a cursive style.

**Chair  
Disciplinary Tribunal**

## **SCHEDULE 1 - THE PCC'S AMENDED NOTICE OF DISCIPLINARY ACTION**

The Professional Conduct Committee seeks a determination that the Member's membership of Chartered Accountants Australia and New Zealand (Chartered Accountants ANZ) be suspended on an interim basis.

It is alleged that, while a member of Chartered Accountants ANZ:

1. on 14 October 2010 the Member was appointed as joint and several liquidator of Neolido Holdings Pty Ltd ACN 102 472 015 (in Liquidation) (Neolido), while a partner of PPB Advisory (PPB);
2. on 25 July 2017 the Member arranged for the transfer of the amount of \$250,000 from the PPB liquidation account for Neolido to an unauthorised account held or controlled by him;
3. on 5 September 2017 the Member arranged for the transfer of the amount of \$450,000 from the PPB liquidation account for Neolido to an unauthorised account held or controlled by him;
4. on 9 November 2017 the Member arranged for the transfer of the amount of \$100,000 from the PPB liquidation account for Neolido to an unauthorised account held or controlled by him;
5. on 19 February 2018 PPB became aware of the defalcations from the PPB liquidation account referred to in paragraphs 2 – 4 above, in the total amount of \$800,000;
6. on 20 February 2018 the Member admitted fraudulently transferring the total amount of \$800,000 from the PPB liquidation account for Neolido to an account held or controlled by him.

The Professional Conduct Committee is seeking the interim suspension on the basis that it is necessary or desirable having regard to the criteria in By-Law 40(9.1), being the urgency of the matter, interests of the public, reputation of Chartered Accountants ANZ or the integrity of the profession of accounting, which are likely to be satisfied by reason of the Member's alleged conduct.

The time period for which the Professional Conduct Committee is seeking that the interim suspension apply is the earlier of:

- (a) three months after the full and final resolution of the later of:
  - i. all civil and criminal proceedings against the Member; and
  - ii. all regulatory investigations into the Member's conduct; or
- (b) further investigation and determination of the complaints arising from the matters referred to in paragraphs 1 – 6 above.

## 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(9) Interim suspension of Membership**

40(9.1) On application by the Professional Conduct Committee for the interim suspension of a Member, if the Disciplinary Tribunal is satisfied that it is necessary or desirable to do so, having regard to the urgency of the matter, the interests of the public, the reputation of CA ANZ, or the integrity of the profession of accounting, the Disciplinary Tribunal may suspend the Member from Membership of CA ANZ on an interim basis pending further investigation and determination of the complaint.

40(9.2) For the period of a Member's suspension on an interim basis:

- (a) that Member's name shall be removed from the Registers on which it appears; and
- (b) that Member:
  - (i) loses the rights and privileges of Membership;
  - (ii) must surrender that Member's certificate of Membership, certificate(s) of public practice and any other documents specified in paragraph 13.4 to CA ANZ; and
  - (iii) save as provided in paragraph 4.3(e), remains subject to the disciplinary processes and sanctions under these By-Laws (including this Section 5) as if still a Member.

40(9.3) The provisions of paragraph 10 apply to the procedures for a hearing on an application for interim suspension under this paragraph 9, except that:

- (a) the Notice of Disciplinary Action to be given in accordance with paragraph 10.1 must specify that the hearing is on an application by the Professional Conduct Committee for interim suspension;
- (b) the minimum 28 day time periods in paragraphs 10.1 and 10.3 are shortened to 14 days;
- (c) without prejudice to paragraph 13.8, paragraphs 10.12(a) to 10.12(k), and 10.13 (sanctions) do not apply; and
- (d) the maximum period within which the Disciplinary Tribunal is to notify its decision and give reasons in accordance with paragraph 10.15 is reduced to 7 days.

40(9.4) The provisions of paragraph 11 apply to the procedures for an appeal of a decision by the Disciplinary Tribunal in respect of the hearing of an application for interim suspension under this paragraph 9, except that:

- (a) the maximum 21 day time periods in paragraphs 11.1 and 11.2 (time for notifying appeal) are shortened to 14 days;
- (b) the minimum 21 day time period in paragraph 11.4 (notice of hearing) is reduced to 14 days; and
- (c) the maximum period within which the Appeals Tribunal is to notify its decision and give reasons in accordance with paragraph 11.13 is reduced to 7 days.

40(9.5) The provisions of paragraph 9 do not apply to Non-Member Practice Entities.

...

40(13.4) Termination and suspension

If the name of a Member is removed from any Registers on termination or suspension (including suspension on an interim basis) in accordance with this Section 5, the Member's certificate of Membership, any certificate of public practice and any other accreditation, specialisation or other certificate or award then held by the Member is cancelled with immediate effect and must be delivered up by the former Member to CA ANZ.