

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 **Paulette Julia O'Reilly**, Chartered Accountant, of **Wellington**

**DETERMINATION OF THE DISCIPLINARY TRIBUNAL OF THE NEW ZEALAND
INSTITUTE OF CHARTERED ACCOUNTANTS
28 November 2017**

Hearing: 23 November 2017

Location: The offices of Chartered Accountants Australia and New Zealand, Level 7, Chartered Accountants House, 50-64 Customhouse Quay, Wellington, New Zealand

Tribunal: Mr MJ Whale FCA (Chairman)
Mr DJH Barker FCA
Mr RG Simpson CA
Dr R Janes (Lay member)

Legal Assessor: Mr Matthew Casey QC

Counsel: Mr Richard Moon for the prosecution
Mr John Morrison for the Member

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At a hearing of the Disciplinary Tribunal held in public at which the Member was not in attendance but were represented by counsel, the Member pleaded guilty to Charge 1 and asserted that as she had accepted the most serious charge, there was no need to plead to, or for the Tribunal to deal with, the other charges. The Member admitted Particulars 1, 2(a) and 2(c), partially admitted Particular 3(a) and denied Particulars 2(b) and 3(b).

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 13.39, the Member is guilty of:

- (1) Misconduct in a professional capacity.
- (2) Conduct unbecoming an accountant; and/or
- (3) Supplying information to the Institute which is false or misleading; and/or
- (4) Breaching the Institute's Rules and Code of Ethics.

PARTICULARS

IN THAT

Being a Chartered Accountant in Public Practice and in relation to a complaint, the Member:

- 1) Between 26 May 2006 and 13 September 2016 misappropriated \$57,000 by way of 105 withdrawals from client monies held in the Member's Savings bank account on behalf of her client Mr W, in breach of the Fundamental Principles of Integrity and/or Professional Behaviour of the Codes of Ethics (2003) and/or the Code of Ethics (2014); and/or
- 2) Failed to comply with PS-2 *Client Monies* ("PS-2"), in that the Member:
 - a) Used Mr W's client monies for purposes other than the purpose for which the funds were to be held and/or used them for the Member's personal and/or practice transactions, in breach of paragraph 11(d) of PS-2; and/or
 - b) Withdrew fees from Mr W's client monies without authority, in breach of paragraphs 49 and/or 50 of PS-2; and/or
 - c) Allowed bank fees to be withdrawn from Mr W's client monies, in breach of paragraph 52 of PS-2; and/or

in breach of the Fundamental Principles of Quality Performance and/or Professional Behaviour of the Code of Ethics (2003) and/or the Fundamental Principle of Competence and Due Care and/or Professional Behaviour of the Code of Ethics (2014); and/or

- 3) During the disciplinary proceedings in 2016 relating to Mr W's complaint of 2 October 2015, provided information to the Disciplinary Tribunal about the Member's handling of his monies that was false and/or misleading and/or furnished recklessly, in particular:
 - a) The Member provided a spreadsheet in November 2016 reconciling payments received and made on Mr W's behalf which was materially different from the Member's bank

statements, in that her spreadsheet omitted \$4,868.43 worth of commission payments the Member had received on his behalf and/or disclosed \$14,600 worth of payment to the IRD or Mr W which had not occurred; and/or

- b) In responding to questions from the Disciplinary Tribunal the Member gave assurances that funds had in all material respects been kept separate from the Member's own and/or used for Mr W's benefit and/or had been appropriately accounted for, when that was not the case,

in breach of the Fundamental Principle of Integrity and/or paragraph 110.1 and/or 110.2 and/or the Fundamental Principle of Professional Behaviour and/or paragraph 150.1 of the Code of Ethics (2014).

In relation to the charges:

- The PCC was prepared to treat Charge 2 as an alternative charge to Charge 1.
- The PCC wished to proceed with Charge 3, as misleading the Institute was a very serious matter. The Member had denied one of the Particulars and partially denied the other Particular which supported this charge. The Tribunal agreed that the Charge is a serious one that needs to be properly addressed. The Tribunal proceeded on the basis that the Member pleaded not guilty to that charge.
- The Tribunal considers that, to the extent that the Member has admitted the Particulars or the Tribunal finds the Particulars made out, it follows that the Member is guilty of Charge 4 - breaching the relevant Rules and the Code of Ethics of the Institute.

DECISION

The Member chose not to give formal evidence but relied on statements made to the PCC by the Member, or on her behalf by legal counsel, during the disciplinary process. This is against the background that the Member acknowledges that the conduct which the Member has admitted constituted misconduct in a professional capacity.

However, the Member has denied misleading the Institute and the Tribunal during the hearing in November 2016. The PCC submitted, in reliance on paragraphs 10-16 of the Appeals Council's decision in *Gormack* (29 March 2017) and the case law cited in those paragraphs, that the Tribunal is entitled to draw inferences (adverse to the Member) from the evidence before it in circumstances where the Member has chosen not to give evidence which explains, qualifies or contradicts the evidence tendered by the PCC.

To paraphrase the Appeals Council: If a member wishes to explain, qualify or contradict evidence produced by the PCC, the member must properly prove the facts upon which he or she relies, including by giving evidence on oath (which can be subject to cross examination) and by producing any relevant documents relating to the member's stated position. Where the member chooses not to do so, the Tribunal is entitled to accept the unchallenged evidence of the witnesses called by the PCC and to draw inferences from that evidence, including drawing an inference that the giving of evidence on oath and being subjected to cross examination by the PCC would not have assisted their case.

Pursuant to Rule 13.38 of the Institute's Rules, the Tribunal has power to receive as evidence any statement, document or information whether or not it would be admissible in a Court. However, little weight will be given to untested assertions in correspondence or other communications with the PCC (or others), or assertions by counsel, as evidence of the facts relied on or the Member's understanding or state of mind.

Particulars 1 and 2

In relation to the disputed Particular 2(b), the PCC submits that the unchallenged evidence of the PCC's investigator, Mr Gray, was that four withdrawals from monies the Member held for her client were annotated on the bank statements as fees. His conclusion was that that suggested that the Member had drawn fees in a manner inconsistent with paragraphs 49 and 50 of the PS-2 (Client Monies).

The Member (through her counsel) dealt with this on the basis that if the Tribunal is satisfied the Particular was made out, the Member would not contest it further, but whatever the outcome it would not impact on the consequences. Although it notes that the relevant amounts are included in the amount that the Member has reimbursed or repaid her client, in the absence of any explanation from the Member, the Tribunal finds the Particular proved on the balance of probabilities. It agrees with the Member's counsel that its finding on this point has no effect on the outcome of this hearing – in the Tribunal's view this is the least serious of the allegations the Member faced.

The Tribunal finds on the evidence before it that Particulars 1 and 2 (which except for 2(b) the Member admitted) are made out. They clearly support Charge 4. Also, as the Tribunal has held on numerous occasions, the Fundamental Principle of Integrity is the cornerstone of professional ethics and a breach of that principle constitutes very serious misconduct. Misappropriation of client funds squarely falls within the ambit of misconduct in a professional capacity. Particulars 1 and 2 support Charge 1, to which the Member has pleaded guilty.

Particular 3

In relation to Particular 3(a), the Member admitted that she had provided a spreadsheet which failed to accurately reconcile payments received and made on the Member's client's behalf. However, the Member did not admit that that was false and/or misleading and/or furnished recklessly.

The Tribunal had before it a letter from the Member's then counsel to Mr Gray dated 10 May 2017 containing an explanation as to the circumstances in which the spreadsheet was prepared and the methodology the Member used. Mr Gray acknowledged before the Tribunal that the Member had told him that she was shocked by the inaccuracies in that spreadsheet which he had identified as a result of his investigation. Mr Gray noted in his report that the explanations in the 10 May letter largely confirmed matters of which the Member had previously advised him.

In an email to the PCC's counsel on 16 November 2016 the Member's counsel, no doubt on the Member's instructions, made the unequivocal statement that the spreadsheet provided a full record of monies received into the relevant bank account and the monies paid out to IRD or the Member's client as instructed. He also stated that that spreadsheet was a composite and update of spreadsheets provided to the Member's client from time to time. In the Tribunal's view these

statements do not sit comfortably with the explanation in the May 2017 letter as to how the spreadsheet was prepared, and methodology used.

The Tribunal accepts Mr Gray's unchallenged evidence that the Member's original spreadsheet contained the errors referred to in Particular 3(a). The spreadsheet was false and misleading. Also, as the PCC noted, all of the variances identified were in the Member's favour. The 13 payments to IRD or the Member's client which were overstated on the spreadsheet, in some cases substantially, were generally overstated by \$500, \$1,000 or multiples of those amounts – the Tribunal draws the inference, in the absence of any explanation from the Member, that these overstatements were not inadvertent, were at best reckless and in all probability were deliberately made to conceal the Member's misappropriation.

In relation to Particular 3(b), the starting point is that when asked by the Tribunal at the original hearing what transactions went through the relevant bank account (other than monies belonging to the Member's client) the Member stated that the only other transactions were amounts the Member had to reimburse that account for as a result of inadvertently hitting the wrong button when the Member was using the ATM machine. And (through the Member's counsel) "whatever has come out has been reimbursed".

Mr Gray's evidence (substantially accepted by the Member following compilation of the Member's own spreadsheet in May 2017) was that there had been 105 withdrawals from that account which were not for the Member's client's benefit, a significant majority of which were not ATM withdrawals. He concluded that the Member had failed to account to her client for more than \$23,000. The statements the Member made to the Institute and the Tribunal at the November 2016 hearing were clearly false and misleading.

The Member's counsel described the Member as being careless. Implicit in the submissions presented by counsel was the Member's understanding that the only monies the Member held for her client had been the funds that the Member claimed a lien on of approximately \$8,300 as reflected in the Member's original spreadsheet. However, the Member has chosen not to give evidence on oath as to her state of mind, understanding or belief.

The Tribunal has found that some of the errors in the Member's original spreadsheet were at best made recklessly and in all probability were deliberate. The Member's resistance at the original hearing to having the account transactions investigated, without explanation from the Member now that that investigation has shown the Member's misappropriations, leads the Tribunal to draw the inference that the Member knew at the time that her misconduct would be exposed. The Tribunal does not accept the Member's assertions that she agreed to an audit – the record discloses the opposite. The Tribunal finds that the false and misleading assurances the Member gave it that her client's funds had been appropriately accounted for were given at best recklessly and in all probability deliberately.

The Tribunal finds Particular 3 made out. It clearly supports Charge 4. The Tribunal considers that recklessly or deliberately misleading the Institute and the Tribunal is action that the Member should know may discredit the profession – conduct which breaches the Fundamental Principle of Professional Behaviour. That conduct, which demonstrates a lack of honesty, truthfulness and fair dealing, also breaches the Fundamental Principle of Integrity.

The Tribunal also finds this Particular supports Charge 1. Misleading the Institute in relation to a member's dealing with client funds is at the high end of the scale of seriousness. The test for

misconduct in a professional capacity is whether the member has so behaved in a professional capacity that the acts under scrutiny would be reasonably regarded by his or her colleagues as constituting professional misconduct. The test is objective. While misconduct usually implies an act done wilfully with a wrong intention, in the Tribunal's view it also encompasses reckless conduct in the context of a disciplinary hearing. The Member's conduct would reasonably be regarded by the profession as constituting professional misconduct.

PENALTY

The PCC sought removal of the Member's name from the Register. The Member accepted that that was the inevitable consequence of her misconduct.

The Tribunal notes the Member's full cooperation with the investigation and that the Member has reimbursed or repaid her client the amount identified by the Institute's investigator as having been misappropriated, together with interest as estimated by the investigator. It also notes Mr Gray's evidence that his investigations, which included a review of the Member's practice account, did not disclose any issues with other clients. The Tribunal has also had regard to the expression of support by the Member's partner.

However, as the Tribunal has held on numerous occasions, misappropriation of client funds is incompatible with membership of the Institute. Here the position was also exacerbated by the Member misleading the Institute. In the Tribunal's view, the only appropriate penalty is that sought by the PCC which the Member has accepted.

Pursuant to Rule 13.40(a) of the Rules of the New Zealand Institute of Chartered Accountants the Disciplinary Tribunal orders that the name of Paulette Julia O'Reilly be removed from the Register of Members and that Chartered Accountants Australia and New Zealand be promptly advised of that removal.

COSTS

The Professional Conduct Committee seeks full costs of \$30,763.

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 Member took issue with some of the components of the costs schedule, particularly in light of the fact that the hearing was relatively brief (approximately three hours) and accommodation costs. The Member also noted that the Institute is aware that her financial circumstances are limited.

Having regard to its practice note, the Member's submissions and those of the PCC, and a review of the costs schedule, the Tribunal considers that a costs order of \$24,000 is fair and reasonable in the circumstances.

Pursuant to Rule 13.42 of the Rules of the New Zealand Institute of Chartered Accountants the Disciplinary Tribunal orders that Paulette Julia O'Reilly pay to the Institute the sum of \$24,000 in respect of the costs and expenses of the hearings before the Disciplinary

Tribunal, the investigation by the Professional Conduct Committee and the cost of publicity. No GST is payable.

SUPPRESSION ORDERS

Pursuant to Rule 13.62(b) of the Rules of the New Zealand Institute of Chartered Accountants the Disciplinary Tribunal orders that the name of the Member's client whose funds were misappropriated be suppressed.

PUBLICATION

In accordance with Rule 13.44 of the Rules of the New Zealand Institute of Chartered Accountants the decision of the Disciplinary Tribunal shall be published on the Institute'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 13.47 of the Rules of the New Zealand Institute of Chartered Accountants which were in force at the time of the original notice of complaint, the parties may, not later than 14 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 order 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 small flourish at the end.

MJ Whale FCA
Chairman
Disciplinary Tribunal