

Determination of the Disciplinary Tribunal of Chartered Accountants Australia and New Zealand 15 November 2018

Case Number:	D-1192
Member:	Scott Francis Fleay CA of Western Australia
Hearing Date:	8 November 2018
Tribunal:	David Fairlie (Chair) Bruce Glanville FCA Kathryn Brown CA
Tribunal Legal Adviser:	Lauren Stewart
Representation:	Michael Bradley for the Professional Conduct Committee (PCC) The Member did not appear with the consent of the Tribunal
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) four months after the full and final resolution of all criminal proceedings against the Member; or
- (b) further investigation and determination of the complaints arising from the charges set out at paragraphs 1 - 20 of the 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:

- Tax Practitioners Board
- CPA Australia
- Tax Institute.

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

On 7 August 2018, the Western Australian Police brought twenty charges against the Member pursuant to the Criminal Code (WA) that, in short, whilst being either a director or holding power of attorney, the Member stole money in the amount of approximately \$4.7 million.

Subsequently, on 1 September 2018 a Western Australian newspaper reported that the Member "stole about \$4.7 million" and "was charged with 19 counts of stealing while holding power of attorney and one count of stealing as a director or officer of a company".

The Member advised the Tribunal that he denied the allegations but, as there were legal proceedings underway, he was unable to provide supporting information. The Member advised the Tribunal that he would defend the charges brought by the Western Australian Police and that he would have the opportunity to address the allegations through the legal process.

4. REASONS FOR DECISION ON INTERIM SUSPENSION

Submissions from the PCC

- The PCC submitted that:
 - the discretionary power to order interim suspension under By-Law 40(9.1) arises where the 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 Chartered Accountants ANZ
 - the integrity of the profession of accounting.

The Tribunal only needs to be satisfied of one of those matters for the discretion to be enlivened

- an interim suspension is a protective function which operates ahead of, and in the absence of, a fully contested hearing over the allegations of breach. An interim suspension ordinarily arises, as it has in this case, where the ultimate outcome is not known and is not knowable
- in the case of an interim suspension, the Tribunal does not have to make any final determination with regard to the underlying facts or legal issues and, importantly, can proceed on scant evidence

- in this instance, the Member is accused by the Western Australian Police of a fundamental and gross breach of his trust and professional obligations by misusing his position (as an accountant and whilst holding a power of attorney) to steal very large sums of money over an extended period of time
- misappropriation or theft of money goes to the very heart of the trust that a public accountant holds and is in the worst category of conduct that a member can commit
- if the Member is found guilty of the charges as alleged there is a very high likelihood that he will face a custodial sentence. The maximum term of imprisonment for that charge is ten years per offence, so he could be facing a fairly extended custodial sentence
- the Member has agreed that it is appropriate that he be suspended on an interim basis until the conclusion of the criminal proceedings against him
- it is entirely appropriate and the obvious course for the Tribunal to interim suspend the Member, given the seriousness of the charges.

Submissions from the Member

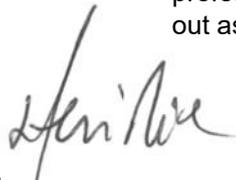
- The Member strongly denied that he was guilty of the charges brought by the Western Australian Police. He advised that he would fight the charges.
- However, the Member, through his legal representative:
 - consented in writing to the application for an interim suspension
 - requested that he and his legal representative not be required to appear at the hearing of the Disciplinary Tribunal. The Tribunal subsequently agreed to that request.

Tribunal's decision

- The Tribunal considered the matters it must take into account in determining an application for an interim suspension. Those matters 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 involving large sums of money
 - due to the potential impact of the allegations, it is necessary to take prompt action to protect the reputation of Chartered Accountants ANZ and more broadly, the professional body of accounting
 - the criminal hearing of the charges will likely result in further adverse media coverage, and continue to 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 would 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 APPLICATION

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 on 7 August 2018, while a member of Chartered Accountants ANZ, the following twenty charges were brought by Western Australian Police against the Member pursuant to the *Criminal Code* (WA), that he:

1. On 24 April 2007 "*holding power of attorney of [Mr and Ms J], stole Australian money valued at \$2,000,007.50, received for the disposition thereof*";
2. Between 25 and 26 March 2009 "*being a director of [a company] stole Australian money valued at \$6225.28 the property of [that company]*";
3. On 24 July 2007 "*holding power of attorney of [Mr and Ms J], stole Australian money valued at \$1000, received for the disposition thereof*";
4. On 30 June 2008 "*holding power of attorney of [Mr and Ms J], stole Australian money valued at \$20,000, received for the disposition thereof*";
5. On 30 June 2008 "*holding power of attorney of [Mr and Ms J], stole Australian money valued at \$20,000, received for the disposition thereof*";
6. On 30 June 2008 "*holding power of attorney of [Mr and Ms J], stole Australian money valued at \$20,000, received for the disposition thereof*"
7. On 25 July 2008 "*holding power of attorney of [Mr and Ms J], stole Australian money valued at \$474, received for the disposition thereof*";
8. On 11 August 2008 "*holding power of attorney of [Mr and Ms J], stole Australian money valued at \$2,399,575.14, received for the disposition thereof*";
9. On 22 October 2008 "*holding power of attorney of [Mr and Ms J], stole Australian money valued at \$65,000, received for the disposition thereof*";
10. On 24 October 2008 "*holding power of attorney of [Mr and Ms J], stole Australian money valued at \$20,000, received for the disposition thereof*";
11. On 14 and 15 November 2008 "*holding power of attorney of [Mr and Ms J], stole Australian money valued at \$5,000, received for the disposition thereof*";
12. On 5 June 2009 "*holding power of attorney of [Mr and Ms J], stole Australian money valued at \$20,000, received for the disposition thereof*";
13. On 5 June 2009 "*holding power of attorney of [Mr and Ms J], stole Australian money valued at \$20,000, received for the disposition thereof*";
14. On 17 July 2009 "*holding power of attorney of [Mr and Ms J], stole Australian money valued at \$100,000, received for the disposition thereof*";
15. On 6 October 2009 "*holding power of attorney of [Mr and Ms J], stole Australian money valued at \$10,000, received for the disposition thereof*";
16. On 29 October 2009 "*holding power of attorney of [Mr and Ms J], stole Australian money valued at \$3997, received for the disposition thereof*";
17. On 15 January 2010 "*holding power of attorney of [Mr and Ms J], stole Australian money valued at \$10,000, received for the disposition thereof*";
18. On 29 June 2010 "*holding power of attorney of [Mr and Ms J], stole Australian money valued at \$20,000, received for the disposition thereof*";
19. On 24 August 2010 "*holding power of attorney of [Mr and Ms J], stole Australian money valued at \$5,000, received for the disposition thereof*"; and

20. On 24 February 2010 *“holding power of attorney of [Mr and Ms J], stole Australian money valued at \$4000, received for the disposition thereof”*.

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 your alleged conduct.

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

- (a) four months after the full and final resolution of all criminal proceedings against you; or
- (b) further investigation and determination of the complaints arising from the charges set out at paragraphs 1 – 20 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(6) Interim or Final Decision

40(6.1) During an investigation, the Professional Conduct Committee may decide to:

...

- (e) refer the complaint directly to the Disciplinary Tribunal (without convening a Case Conference) where it is satisfied that:

...

- (viii) the matter is sufficiently serious that the Disciplinary Tribunal may suspend the Member on an interim basis;

...

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.

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

...

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.