

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 **Murray Byron Provan**, Former Chartered Accountant, of **Tauranga**

**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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A hearing of the Disciplinary Tribunal was held in public. The Former Member was not in attendance and not represented by counsel

The charge and particulars as laid were as follows:

CHARGE

THAT in terms of the New Zealand Institute of Chartered Accountants Act 1996 and the Rules made thereunder, and in particular Rule 13.50 the Former Member:

1. Has been convicted of an offence punishable by imprisonment or a fine, and the conviction reflects on his fitness to practise accountancy and/or tends to bring the profession into disrepute.

PARTICULARS

IN THAT

On 22 February 2019 in the District Court at Tauranga he was convicted of the following offences for conduct which occurred during his membership of NZICA:

- (1) One representative charge pursuant to s 240(1) of the Crimes Act 1961 of obtaining by deception \$390,000 between 1 June 2011 and 30 September 2013; and/or
- (2) One representative charge pursuant to s 240(1) of the Crimes Act 1961 of obtaining by deception \$255,000.00 between 1 June 2011 and 30 September 2013.

DECISION

Acknowledgement of service, signed by the Former Member on 4 November 2019, shows that he received the notice of charge, a letter from the Institute's Professional Conduct Committee ("PCC") of 1 November 2019 (advising of the hearing on 12 December and related procedural matters), the Disciplinary Tribunal's Practice Note as to Costs and Expenses, a document outlining the procedure to be followed at hearings of the Disciplinary Tribunal, the brief of evidence of Christian David Pinkney (for the Professional Conduct Committee to establish the elements of the charge), the bundle of exhibits accompanying that brief of evidence and the Professional Conduct Committee minute of 30 October 2019 referring the matter to the Disciplinary Tribunal.

As at the date of the hearing, the former member had not responded to the letter of 1 November 2019. Accordingly, he did not formally enter a plea to the charge. The matter proceeded by way of formal proof.

The Tribunal has considered all of the evidence, independently, in order to be satisfied that the charge is made out by the Professional Conduct Committee to the required standard of proof. For the following reasons, it is satisfied that the charge is so made out on the evidence presented.

The Tribunal finds that the Particulars in the charge are borne out by the evidence presented. It is a fact that the former member was convicted on 22 February 2019 of 2 counts of obtaining by deception pursuant to s 240(1) of the Crimes Act 1961 and was sentenced to four years and six months imprisonment. The Appeal period has expired and no appeal has been lodged.

The Tribunal is required to determine if this conviction reflects on the Former Member's fitness to practice accountancy and/or tends to bring the profession into disrepute. The Former Member has

not practised accountancy for many years. The decision focusses on whether the conviction tends to bring the profession into disrepute.

The Judge's sentencing remarks (at [2019] NZDC 3241) noted his previous career as a chartered accountant. The Judge noted that the Former Member "*exploited these two ladies through your church under the guise of Christian courtesy and decency whereas in fact you were dishonest and have been found to be deceptive*". The Judge also noted "*There was premeditation by you, Mr Provan*" and "*you were deceptive and devious and knowingly so*".

The Tribunal finds that the Former Member's actions do bring the profession into disrepute and accordingly finds the former member guilty of the charge.

A letter from the Former Member dated 5 December was received by the Tribunal secretary on 13 December, the day after the hearing. In his letter the former member denies any wrongdoing but also states "*Please forgive me and make whatever decisions your committee deems absolutely necessary*". The Tribunal is satisfied that had the letter been available at the hearing, it would not have changed the decision of the Tribunal in finding the member guilty of the charge.

PENALTY

The Professional Conduct Committee (PCC) sought an order that if the Former Member had still been a member, his name would have been removed from the register.

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 subsequent Courts have 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 *Peter Blacklaws* (22 October 2014) and *Nigel O'Leary* (15 April 2014). Both were former members and both were convicted of crimes of dishonesty. Both would have had their names removed from the Institute's register of members had they still been members of the Institute

The PCC submitted that the misconduct was of the most serious kind, that there is a need to preserve standards and deter others and that the former member's lack of insight into his offending, as noted in the Judge's sentencing remarks, is an aggravating factor.

Dishonesty of this nature is incompatible with membership of the Institute and the Tribunal agrees that the proportionate response would be that if the Former Member had still been a member, his name would have been removed from the register.

Pursuant to Rule 13.87(a) of the Rules of the New Zealand Institute of Chartered Accountants, the Disciplinary Tribunal finds that if MURRAY BYRON PROVAN had still been a member of the Institute his name would have been removed from the Institute's register of members.

COSTS

The Professional Conduct Committee seeks full costs of \$7,447.

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

The Former Member had made no submission in relation to costs in his letter of 5 December 2019. Having regard to all relevant circumstances, the Tribunal considers that costs of \$7,447 are fair and reasonable.

Pursuant to Rule 13.53 of the Rules of the New Zealand Institute of Chartered Accountants the Disciplinary Tribunal orders that the Former Member pay to the Institute the sum of \$7,447 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.

PUBLICATION

The PCC sought publication of this decision in *Acuity* magazine and on the Institute's website with mention of the Former Member's name and location.

The starting point and default position is that the public interest in open justice and transparency in the maintenance of confidence in the professional disciplinary process creates a presumption in favour of full publication. That presumption is strongly reflected in the Institute's Rules, including Rule 13.55 (a).

In his letter dated 5 December 2019, the Former Member asked that "*no media publications be made at all*". He gave no reasons for this request. The Tribunal does not consider that there are any reasons to depart from the default position of full publication.

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 and in the official publication *Acuity* with mention of the Former 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 shall take effect while the parties remain entitled to appeal, or while any such appeal by the parties awaits determination by the Appeals Council.



MJ Whale FCA
Chairman
Disciplinary Tribunal