

**BEFORE THE NEW ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS
APPEALS COUNCIL**

IN THE MATTER OF An appeal against the decision of the Disciplinary Tribunal of the
New Zealand Institute of Chartered Accountants

BETWEEN **MURRAY BYRON PROVAN**, Former Chartered Accountant of
Tauranga

Appellant

AND **THE PROFESSIONAL CONDUCT COMMITTEE OF THE NEW
ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS**

Respondent

**DECISION OF APPEALS COUNCIL ON APPLICATION BY THE PROFESSIONAL
CONDUCT COMMITTEE FOR SECURITY OF COSTS**

Dated 16 August 2021

Members of the Appeals Council:

Les Taylor QC (Chair)

Counsel:

Appellant (unrepresented)

Richard Moon for the Professional Conduct Committee

Appeals Council Secretariat:

Janene Hick

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Please refer to the decision of the Disciplinary Tribunal dated 20 December 2019



Background

1. On 22 February 2019, the appellant was convicted on two representative charges of obtaining money by deception, \$390,000 between 1 June 2011 and 30 September 2013 and of obtaining money by deception, \$355,000 between 1 June 2011 and 30 September 2013. The appellant was sentenced to 4½ years imprisonment.
2. On 20 December 2019, the Disciplinary Tribunal of the New Zealand Institute of Chartered Accountants (Disciplinary Tribunal) issued its determination in respect of a single charge against the appellant under Rule 13.5(a), that he had been convicted of an offence punishable by imprisonment or a fine and the conviction reflects on his fitness to practice accountancy and/or brings the profession into disrepute.
3. The Disciplinary Tribunal in its decision referred to the sentencing notes of the District Court Judge including statements that the appellant had exploited two ladies under the guise of Christian courtesy and decency whereas in fact the appellant was dishonest and had been found to be deceptive. The Judge stated that the appellant had been "deceptive and devious and knowingly so".
4. The Disciplinary Tribunal made a declaration pursuant to Rule 13.87(a) of the Rules that, had the appellant still been a member of the Institute, his name would have been removed from the Institute's Register of Members. The Disciplinary Tribunal also ordered the appellant pay costs of \$7,447 and ordered that the decision of the Disciplinary Tribunal be published on the Institute of Chartered Accountants Australia and New Zealand website and in the official publication *Acuity* with mention of the member's name and locality.
5. By letter dated 7 January 2020, the appellant gave notice of an appeal. The letter is somewhat rambling in nature and the precise grounds of appeal are difficult to define. It appears, however, that the appellant wishes to appeal the Disciplinary Tribunal decision on the following grounds:
 - (a) Appealing the decision finding the charge proved, apparently on the grounds that the Disciplinary Tribunal did not have before it an FMA transcript of an interview with the appellant which would have proved that the appellant did not handle any monies at all and would reveal "the truth and facts of my actions". The appellant also complained that the Disciplinary Tribunal documents were served on him whilst in prison which, he says, goes against his "personal integrity, ethical standards and moral PRINCIPALS (sic)".
 - (b) The appellant appeals the order for costs by the Disciplinary Tribunal on the grounds that he has no money to pay the costs and will not be paying any monies to the Institute in the future either.

- (c) The appellant appeals the Disciplinary Tribunal's order as to publication on the grounds that he has requested that there be no media publication and that he has rights under the Privacy Act 1994 which protect him against any such order.
6. By letter dated 3 March 2019, Mr Moon, on behalf of the Professional Conduct Committee (PCC), wrote to the appellant advising him that (for the reasons stated) the PCC considered his appeal was unlikely to succeed and was concerned that the appellant would be unable to meet any adverse costs order should it be made. The PCC requested a payment of \$5,000 by way of security for costs. The appellant responded by letter dated 12 March 2020 requesting that the PCC "completely withdraw and terminate" the proceedings which the appellant considered reflected "a desire to persecute me when the circumstances were well out of my control". He also asserted that he would not be paying any monies to anyone "at all".

Application for Security

7. On 25 May 2020, the PCC filed an application for security for costs together with submissions in support and an affidavit of Christian David Pinkney in support of the application. The application and supporting documents were served on the appellant at the Waikeria Corrections Facility on 29 May 2020. There was no response from the appellant.
8. The appellant was written to on 12 October 2020 and invited to make any submissions to the Appeals Council in respect of the application no later than 23 November 2020. No further correspondence or response has been received from the appellant.

Decision

9. This is the first application for security for costs since the introduction of Rule 13.69 which states:

The Appeals Council may require the Member to pay such amount as it determines to NZICA as security against the anticipate costs which NZICA may incur in the conduct and hearing of the appeal. The Appeals Council may stipulate a time period of not less than 28 days within which the Member must pay the amount and, if it does so and the Member has not paid the amount at the expiry of that period, the appeal will automatically lapse.

10. Mr Moon made submissions as to the approach to an application for security for costs in the context of an appeal from a decision of the Disciplinary Tribunal. As he pointed out, the approach adopted by the Supreme Court in *Reekie v Attorney-General* [2014] NZSC 63, may well be the appropriate test in this context as opposed to the

more commercially flavoured principles adopted by the High Court in respect of Rule 5.45 of the High Court Rules.

11. I do not consider it necessary to address which of those approaches should be applied in this case. On any view of it, I am satisfied that it is appropriate for an order for security to be made.
12. The appeal against the Disciplinary Tribunal finding the charge proved appears to be misconceived. As pointed out by Mr Moon, the grounds of appeal appear to relate to the merits of the criminal charges in respect of which the appellant was convicted and subsequently imprisoned. The charge before the Disciplinary Tribunal required proof of the conviction but did not require proof that the conviction was justified. The merits or otherwise of that conviction are not relevant to the appeal. The evidence before the Tribunal, including the convictions themselves and the sentencing notes, was clearly sufficient to find the charge before it was proved.
13. There is little in the appeal which would suggest that the order for costs should not have been made. The only ground put forward is that the appellant has no money and will not pay any monies to NZICA in respect of proceedings which he regards as persecution.
14. The appeal against publication appears to be baseless and is unlikely to succeed.
15. It is also apparent from the correspondence and notice of appeal that the appellant has no funds and has no intention of paying any costs ordered against him either in respect of the Disciplinary Tribunal costs order or the costs of an appeal. In those circumstances, the PCC and the Institute should not be put to the cost of proceeding with an appeal which appears to have little prospect of success and even less prospect of resulting in any payment by the appellant.
16. The PCC is entitled to the orders sought.

Order of Appeals Council

17. The Appeals Council orders, under delegated authority to the Chair, that:
 - (a) The appellant is to pay a sum of \$5,000 to the New Zealand Institute of Chartered Accountants as security against the anticipated costs which the New Zealand Institute of Chartered Accountants may incur in the conduct and hearing of the appeal.
 - (b) The sum of \$5,000 is to be paid within 30 days of the date upon which this order is served upon the appellant.

- (c) The sum of \$5,000 shall be held by the New Zealand Institute of Chartered Accounts upon its undertaking to return the funds to the appellant in the event that the appeal succeeds, and no adverse costs order is made against the appellant in relation to the appeal.
- (d) The appeal is stayed pending expiry of the 30-day period referred to in (b) above.
- (e) If payment of the security in the sum of \$5,000 is not made within the 30-day period specified in (b) the appeal shall, in accordance with Rule 13.69, automatically lapse.
- (f) The costs of this application shall lie where they fall.

Dated this 16th day of August 2021.

A handwritten signature in blue ink, appearing to be 'L J Taylor', written in a cursive style.

L J Taylor QC
Chairman
Appeals Council