

HEARING

DISCIPLINARY COMMITTEE OF THE ASSOCIATION OF CHARTERED CERTIFIED ACCOUNTANTS

REASONS FOR DECISION

In the matter of: Mr James Crawford Westwater

Heard on: Tuesday, 14 January 2020

Location: ACCA, The Adelphi, 1-11 John Adam Street, London, WC2N
6AU

Committee: Mr Michael Cann (Chair)
Mr Ryan Moore (Accountant)
Mr Andrew Gell (Lay)

Legal Adviser: Miss Judith Chrystie

Persons present

and capacity: Miss Harriet Gilchrist (ACCA Case Presenter)
Miss Rachael Davies (Hearings Officer)

Observers Mr Neil Dalton (new panellist observer)

Summary: Excluded with immediate effect

Costs: £9,429.50

ACCA



+44 (0)20 7059 5000



info@accaglobal.com



www.accaglobal.com



The Adelphi 1/11 John Adam Street London WC2N 6AU United Kingdom

PRELIMINARY MATTERS

SERVICE OF PAPERS

1. The Committee was satisfied there had been effective service of the notice of the hearing; the Notice of Hearing had been sent to Mr Westwater's registered email address in accordance with the requirements of Complaints and Disciplinary Regulations 2014 (as amended) ('the Regulations').

PROCEEDING IN ABSENCE

2. The Committee exercised its discretionary power in Regulation 10(7) of the Regulations to proceed in Mr Westwater's absence. It recognised that it should only do so with the utmost care and caution. It considered whether Mr Westwater had voluntarily waived his right to attend the hearing. In doing so it reviewed its service bundle with page numbers 1-19.
3. Mr Westwater had co-operated and communicated with ACCA throughout the investigation and in connection with the hearing. He completed and signed a Case Management Form on 3 November 2019, in which he had stated that he intended to attend the hearing in person. However, in an email to the Hearings Officer dated 24 December 2019, he stated that he, '*will not now be attending the hearing...*' and setting out his reflections and health-related reasons for his decision. Mr Westwater did not seek to adjourn the proceedings and in an email dated 7 January 2020, he stated to the Hearings Officer:

I can confirm for the avoidance of doubt that I am happy for the Committee to proceed with the disciplinary hearing in my absence.

4. The Committee was mindful that the proceedings were in relation to matters that had occurred some years previously, and a complaint that had been raised in 2016. It recognised the public interest in regulatory proceedings being dealt with expeditiously. The Committee determined that there was no purpose in delaying consideration of the case as there was nothing to indicate

that Mr Westwater would attend at a future date if the hearing were to be adjourned – to the contrary his correspondence with the Hearings Officer was unequivocal in his intention not to attend and for the hearing to proceed in his absence.

5. The Committee was satisfied that it was fair and in the public interest to proceed in Mr Westwater's absence.

ALLEGATION

6. The Committee considered the following allegations.

It is alleged that Mr James Crawford Westwater, a partner of Westwaters;

Allegation 1

(a) Falsely certified that any or all of the accounts were prepared from the accounting records for Client A for the periods ending:

(i) 31 October 2012

(ii) 30 April 2013

(b) Prepared the accounts identified in 1(a) above in the knowledge these were being provided to a third party.

(c) His conduct in respect of Allegation 1(a) and/or (b) was:

(i) Dishonest in that he knew the terms of the certificate he attached to the accounts were untrue;

(ii) In the alternative contrary to the Fundamental Principle of Integrity, as applicable from 2012 to 2013 in that the

*conduct referred to was not straightforward and honest;
and/or*

- (iii) Contrary to the Fundamental Principle of Professional competence and due care, as applicable 2012 to 2013.*

Allegation 2

(a) Failed to confirm directly with Client A that the tax returns submitted to HMRC on behalf of Client A were accurate and complete for the years ending:

(i) 5 April 2013

(ii) 5 April 2014

(iii) 5 April 2015

(b) His conduct in respect of 2(a) was:

(i) Dishonest in that he had reason to believe the reported income of the business as stated in the tax return was not accurate and complete;

*(ii) In the alternative contrary to the Fundamental Principle of Integrity, as applicable from 2013 to 2016 in that the conduct referred to was not straightforward and honest;
and/or*

(iii) Contrary to the Fundamental Principle of Professional competence and due care, as applicable from 2013 to 2016.

Allegation 3

(a) Between 2013 and 2016 continued to prepare tax returns for Client A despite being provided with no primary financial records for the business for the years ending:

(i) 5 April 2013

(ii) 5 April 2014

(iii) 5 April 2015

In breach of Section 210.4 as applicable in 2013 to 2016, of the ACCA Code of Ethics and Conduct.

Allegation 4

(a) Between April 2010 and March 2016, failed to comply with the Money Laundering Regulations 2007 then in force in relation to Client A and/or Client B as follows:

(i) Regulation 7 – in respect of applying customer due diligence at other appropriate times to existing customers on a risk-sensitive basis;

(ii) Regulation 19 – in respect of record keeping;

(iii) Regulation 20 – in respect of policies and procedures;

(iv) Regulation 21 – in respect of training.

(b) His conduct in respect of 4(a) was:

- (i) *Contrary to Section 130 the Fundamental Principle of Professional competence and due care, as applicable from 2010 to 2016, and/or*
- (ii) *Contrary to Section 150 the Fundamental Principle of Professional behaviour as applicable 2010 to 2016.*

Allegation 5

- (a) *Failed to issue a letter of engagement in respect of Client A and/or Client B and retain signed copies contrary to Section 3.8(5) of ACCA's Code of Ethics and Conduct (as applicable 2010) and Section B9(5) of ACCA's Code of Ethics and Conduct (as applicable from 2011 to 2016).*

Allegation 6

- (a) *In light of any or all of the facts set out in Allegations 1 to 5 inclusive above he is:*
 - (i) *Guilty of misconduct pursuant to bye-law 8(a)(i); or*
 - (ii) *Liable to disciplinary action pursuant to bye-law 8(a)(iii), save for Allegation 1(c)(i), 1(c)(ii), 2(b)(i) and 2(b)(ii).*

7. The Committee considered the following papers:

- a. Main bundle with pages, numbered 1 to 226;
- b. Tabled additional bundle 1 with pages numbered 10.

BRIEF BACKGROUND AND SUBMISSIONS

8. Mr Westwater became a member of ACCA on 11 January 1990, and a Fellow on 11 January 1995. He currently holds a practising certificate with Audit for the United Kingdom.
9. Mr Westwater is a partner in Westwaters ('the Firm') which holds a Firms Auditing Certificate.
10. On 30 July 2018, HMRC raised concerns with ACCA about Mr Westwater's conduct. They had issued a production order against Mr Westwater, which he had provided a written response ('production order response'). In addition, HMRC had interviewed Mr Westwater under caution on 8 November 2016 ('HMRC interview') and had provided a transcript of the interview.

Allegation 1

11. Accounts prepared for the following periods:

Accounting period	Net profit
1 May 2012 - 31 October 2012	£58,451
Year ending 30 April 2013	£135,455

12. Each account was certified:

'we have prepared these unaudited accounts from the accounting records and information and explanations supplied to us'.

13. In his production order response, Mr Westwater stated that the accounts were:

'simply some numbers pulled together at that time for no other purpose but to give respective landlords some comfort as to the financial position of the company. No accounting records were seen or supplied in the production of these figures.'

14. In the HMRC interview, Mr Westwater admitted that he had made an error of judgement and not met the professional and ethical standards placed upon him. He stated:

- a. The accounts were prepared from information and explanation only supplied by Client B, and not underlying accounting;
- b. He was aware that the accounts were for a landlord;
- c. He changed the round figures provided by Client B to provide the landlord with '*some comfort*' and to ensure the accounts balanced, which he acknowledged would give more credibility;
- d. No reliance should be placed on the accounts, but a landlord could have been misled.

Allegation 2

15. During the HMRC interview, Mr Westwater was asked about the self-assessment tax returns prepared for Client A for tax years ending 5 April 2013, 5 April 2014 and 5 April 2015. Mr Westwater stated:

- a. He acted for Client A but had no direct contact with her regarding the contents and approval of the tax return;
- b. He assumed Client B would discuss the tax returns with Client A, as his wife;
- c. He had requested records but these were not received – but there was no correspondence stating that the figures were estimates subject to receiving accounting records;
- d. No reliance should be placed on the accounts;

- e. Estimates of profits were provided by Client B;
- f. The estimates of profits were different to the estimates in the accounts provided to landlord, and this disparity raised no suspicions based on the absence of supporting records;
- g. The tax returns were submitted to HMRC.

Allegation 3

16. During the HMRC interview Mr Westwater answered questions about continuing to act for Client A despite an absence of primary financial records for the business. He confirmed that he acted and filed the tax return knowing there were issues arising from the absence of accounting records.

Allegation 4

17. The Money Laundering Regulations 2007 came into force on 15 December 2007. During the HMRC interview, Mr Westwater provided limited information regarding the timeframe when Client A and Client B were clients of the Firm, but provided further clarification in his written communication to ACCA, which is set out below.

Allegation 5

18. During the HMRC interview, Mr Westwater confirmed there were no letters of engagement for Clients A or B.
19. On 21 November 2017, ACCA emailed Mr Westwater confirming he had previously purchased the engagement letters product and there were updates available for the 2017 anti-money laundering regulations. On 30 April 2018, ACCA emailed Mr Westwater confirming he had purchased the May 2016 version of the ACCA's engagement letters product, and that an update for the General Data Protection Regulation ('GDPR') was available.

Admissions and Submissions

20. Mr Westwater wrote to ACCA on 4 November 2018, 11 December 2018 and 18 February 2019. In these communications, he made the following representations:

- a. He accepted that no accounting records were seen or supplied in the production of the figures for the accounts. The accounting records were requested on several occasions;
- b. He was not aware whether Client B had shown the accounts to Client A;
- c. Although it was normal procedure to attach a modified report for limited company assignments, this did not happen automatically for sole traders and in this case a modified report was not attached;
- d. He was aware that a landlord might rely upon the accounts to consider granting of a lease and that by not submitting round figures, this gave the accounts more credibility;
- e. He had prepared accounts previously for other landlords this way on behalf of the client;
- f. No reliance should be put on the accounts, and he accepted that the landlord may have been misled;
- g. He prepared the tax returns of Client A based solely on verbal representations, and Client B was asked for estimates of trading profits of the business;
- h. Without sight of the accounting records, he had no idea whether the business made a profit or loss;

- i. The amounts of profits declared on the tax returns were discussed with Client B only - he accepted that he should have spoken with Client A about the tax returns submitted;
- j. Although Client B advised he had authority to act on Client A's behalf, there was no written instruction to this effect;
- k. Client B sought another accountant, and Mr Westwater stated he could no longer act without the supply of those records. He had ceased to act for Client A and B in February / March 2016.
- l. He had acted for Client B since 199,2 and Client A since around April 2010. The current money laundering requirements were not in place when he started to act for Client B. As both Client A and B were known to Mr Westwater, he did not carry out AML checks in relation to the new business, but had visited both the office and retail premises;
- m. Given the long-standing relationship, there were no anti-money laundering client identification records obtained. The policy has now been changed to review long-standing relationships and carry out checks every 2/3 years using service provided by Veriphy;
- n. The Firm held PAYE coding notices and HMRC statements of account for Client A, confirming Client A's address;
- o. There was no engagement letter for Client A and a number of other clients, but one should have been in place. The ACCA engagement letter product was purchased, and new up to date engagement letters have been issued to clients to rectify the omissions.

DECISION ON FACTS/ALLEGATIONS AND REASONS

21. Mr Westwater admitted Allegations 1(b), 2(a), 3(a), 4(a) and 5(a) in the Case Management Form signed by him on 3 November 2019. These were

announced by the Chair as found proved in accordance with Regulation 12(c) of the Complaints and Disciplinary Regulations 2014 (as amended).

22. The Committee considered Allegation 1(a). The Committee was satisfied that the material contained in his bundle demonstrated that Mr Westwater had prepared and certified the accounts. This was not disputed by Mr Westwater. The question was whether the accounts were falsely certified. The Committee recognised that ACCA needed to prove on the balance of probabilities that the certification was false.
23. Mr Westwater claimed that the accounts were not falsely certified. He explained that the certificate included a statement that the accounts had been prepared from information and explanations offered by Client B. The Committee decided that the certification was false. It was clear from the documents, including the HMRC interview record and Mr Westwater's responses to ACCA, that Mr Westwater accepted that no accounting records were seen or supplied in the production of the figures for the accounts. Notwithstanding that fact, he went on to certify that '*we have prepared these unaudited accounts from the accounting records and information and explanations supplied to us*' (Committee's emphasis). The certification plainly, and on any ordinary reading, did not offer the three as alternatives. Information or explanations were not a substitute to basing accounts on accountancy records. The certification was, as a matter of fact, false. The Committee was satisfied that Mr Westwater knew that the certification was false; he knew that the accounts were based only on verbal information provided by Client B; he knew the accounts could not be accurate or complete; his explanation demonstrated that he had considered and engaged with the wording of the explanation which expected accounts to be based on accounting records. The Committee therefore found Allegation 1(a) proved.
24. The Committee considered Allegation 1(c). It applied the two-stage test set out in *Ivey v Genting Casinos (UK) Ltd t/a Crockfords* [2017] UKSC 67 to determine whether Mr Westwater had been dishonest. Mr Westwater had denied his conduct was dishonest.

25. The Committee first ascertained the actual state of the Mr Westwater's knowledge or belief as to the facts. The Committee recognised that Mr Westwater's knowledge or belief did not need to be reasonable but must be genuinely held. However, the Committee also appreciated that the reasonableness of Mr Westwater's purported state of knowledge and belief was something it could consider in weighing and ascertaining his actual state of knowledge or belief.
26. The Committee determined that Mr Westwater knew that the figures were based only on verbal information and must have understood that certifying the accounts were based on accounting records was misleading. Given his understanding of the source of the figures, he could not have made the certification with a genuine belief as to the accuracy of the figures.
27. Having found Mr Westwater's actual state of mind and understanding of his knowledge and belief, the Committee considered the objective limb of the test for dishonesty, namely, whether his conduct was honest or dishonest by the standards of ordinary people. The Committee considered that it was plain that an ordinary, honest and decent member of the public would regard Mr Westwater's conduct in knowingly signing a false certification as dishonest. The Committee found Allegation 1(c)(i) proved. Having done so, the Committee did not consider Allegation 1(c)(ii), which was pleaded in the alternative.
28. The Committee considered it was self-evident that falsely certifying accounts was contrary to the Fundamental Principle of Professional competence and due care, which expected a member to act diligently and in accordance with applicable technical and professional standards when providing professional services. Mr Westwater's conduct was not diligent and not in accordance with expected standards, and the Committee found Allegation 1(c)(iii) proved.
29. In relation to Allegation 2(b)(i), the Committee was satisfied that Mr Westwater had been dishonest. It applied the same subjective and objective test that it had considered in relation to Allegation 1(c)(i). In determining Mr Westwater's actual knowledge and belief as to the fact, the Committee considered that Mr

Westwater clearly recognised, and had admitted, that the figures provided from Client B in producing accounts for Client A for the landlord were significantly different from the figures provided to produce tax returns for Client A. He had no communication with Client A about the tax returns submitted on her behalf; he took no steps to check the accuracy and completeness of the returns with her. Applying the objective test to this subjective state of mind would clearly lead a member of the public to regard Mr Westwater's conduct as dishonest – it was plainly so. The Committee therefore found Allegation 2(b)(i) proved. Having done so it did not consider Allegation 2(b)(ii), which was pleaded in the alternative.

30. The Committee considered that Mr Westwater had acted contrary to the applicable versions of the Fundamental Principle of Professional competence and due care. Mr Westwater's conduct was not diligent and not in accordance with expected standards, and the Committee found Allegation 2(b)(iii) proved.
31. Finally, in relation to the factual allegations, the Committee considered Allegation 4(b). It determined both Allegation 4(b)(i) and (ii) were proved. It was satisfied that the extensive failures to comply with the Money Laundering Regulations 2007 were contrary to section 130 the Fundamental Principle of Professional competence and due care, as applicable from 2010 to 2016, and section 150 the Fundamental Principle of Professional behaviour as applicable 2010 to 2016. Mr Westwater admitted an error of judgement. He was clearly aware – and should have been aware - of the expectations placed on him by the Fundamental Principles. He was not diligent, and he failed to follow relevant and important laws and regulation. The Committee considered that such behaviour was discreditable and brought the profession in to disrepute.
32. The Committee considered whether the allegations found proved amounted to misconduct. It judged a finding that an accountant had been dishonest in a professional regard over a sustained period of time was conduct that fell seriously short of the standards of behaviour expected of a professional and a member of ACCA. This was clearly discreditable conduct. Further, the Committee was satisfied that, notwithstanding the serious dishonesty, the

professional failings and reckless disregard for his basic professional obligations over a prolonged period was, in itself, such deplorable unprofessional behaviour that it amounted to misconduct. The Committee therefore found Allegation 6(a)(i) proved. Having done so, the Committee did not consider Allegation 6(a)(ii), which was pleaded in the alternative.

SANCTION AND REASONS

33. The Committee had regard to the Guidance for Disciplinary Sanctions ('the Guidance').
34. The Committee considered the mitigation in the case. It was advised that there was no disciplinary history; Mr Westwater had a previous good record. The Committee acknowledged that Mr Westwater had constructively engaged and co-operated in the investigation or regulatory process. However, it did not regard this as significant mitigation, given the expectation on him to co-operate as a member of ACCA; it would be an aggravating feature if he had not co-operated.
35. The Committee recognised that Mr Westwater had made early partial admissions regarding a number of the facts alleged, had admitted he had made professional errors of judgement, and had expressed regret regarding his behaviour. However, Mr Westwater had consistently denied he had been dishonest.
36. Further the Committee noted that there was some information that Mr Westwater had suffered from health issues during the time of his some of his misconduct. However, Mr Westwater had not supplied any details, nor had the Committee received independent medical evidence. Finally, the Hearings Officer confirmed that no testimonial evidence or references were provided by, or on, Mr Westwater's behalf.
37. The Committee considered there were a number of aggravating features. First, the Committee had made two separate findings of dishonesty against Mr Westwater. These related to conduct that had been sustained for a significant

period. Further, the misconduct was an organised and deliberate effort to offer a false and misleading level of comfort to a third party and HMRC. In the Committee's view, the making of a false certification and dishonestly submitting tax returns to HMRC placed the misconduct at the serious end of the scale. The dishonesty was committed as part of Mr Westwater's professional activities. It reflected extremely poorly on him. It had the potential to bring the profession into disrepute as well as to damage, significantly, the public's confidence in accountants. The Committee noted with concern that there was no evidence that Mr Westwater had any insight into the significance of his misconduct and his professional failings, and its impact on the profession and the public.

38. Given the significance and severity of the conduct, the Committee determined a sanction was required and that, further, it would be wholly inappropriate and insufficient to conclude this matter with an admonishment or a reprimand. Having carefully considered the specific terms of the Guidance, the Committee was satisfied that these sanctions would not adequately reflect the gravity of the misconduct, which was dishonest, intentional, prolonged and breached ACCA's rules and regulations in a number of respects.
39. The Committee carefully considered whether it would be sufficient to conclude the matter with a severe reprimand. It concluded that such an order would not address the significant damage to public confidence. The misconduct was dishonest, deliberate and repeated over a sustained period. This sort of behaviour could significantly undermine confidence in the profession's integrity, diligence and competence. Further, the Committee considered that Mr Westwater had no insight into, or understanding of, the impact of his behaviour and misconduct on the public, including in the potential that tax payments were inappropriately low. Although he had purchased software to avoid a continuation of his professional failings, the Committee was concerned that Mr Westwater had sought to minimise the extent of his professional misconduct, including within his interview with HMRC. In all these circumstances, the Committee considered that the misconduct was incompatible with Mr Westwater remaining a member of ACCA, and determined that the only appropriate and proportionate sanction was

exclusion from membership; such an order was necessary in the public interest.

40. The Committee considered whether the order should be made with immediate effect. It determined that it was in the interest of the public for Mr Westwater's name to be excluded as swiftly as possible. He continued to act as an accountant and to offer accountancy services. The Committee considered that it would be against the public interest for Mr Westwater to continue to rely on his membership of ACCA to assure the public. The public should be protected with immediate effect.

COSTS AND REASONS

41. ACCA claimed costs in the sum of £9,429.50. Having considered the schedule submitted by ACCA, the Committee was satisfied that the costs were reasonable (assisted by Mr Westwater's co-operation) and had been reasonably incurred.
42. Mr Westwater had provided a statement of financial position, which set out his income and expenditure and his assets. He stated that he had no liquid assets other than his bank current account and offered an explanation for this claim. Although no documentation was provided in support of the financial information, the Committee determined it would accept the figures are accurate and calculated the affordability of a cost order against his declared sum.
43. In determining the appropriate order for costs, the Committee noted that Mr Westwater had not disputed the costs or argued that he could not pay the sums claimed by ACCA.
44. Having reviewed the figures supplied by Mr Westwater, the Committee considered that there was surplus income, some assets and a significant pension contribution that combined to mean Mr Westwater could afford to pay ACCA's costs. The Committee was mindful that other ACCA members should

not be penalised by having to fund the costs of a hearing necessitated by Mr Westwater's dishonest and unprofessional conduct.

45. The Committee ordered that Mr Westwater pay costs to ACCA in the sum of £9,429.50. The Committee makes the order in the expectation that, should Mr Westwater make such a request, ACCA would permit payment by instalments over a period of one year.

Mr Michael Cann
Chair
14 January 2020