

## HEARING

### APPEAL COMMITTEE OF THE ASSOCIATION OF CHARTERED CERTIFIED ACCOUNTANTS

#### REASONS FOR THE DECISION

<b>In the matter of:</b>	<b>Mr Peter McDonnell</b>
<b>Heard on:</b>	<b>Thursday, 20 and Friday, 21 October 2022</b>
<b>Location:</b>	<b>Held remotely by video conference</b>
<b>Committee:</b>	<b>HH Graham White (Chair) Mr Ryan Moore (Accountant) Mr Colin Childs (Lay)</b>
<b>Legal Adviser:</b>	<b>Mr David Marshall</b>
<b>Persons present and capacity:</b>	<b>Mr Peter McDonnell (Member) Mr Ivan Toner (Counsel for Mr McDonnell) Mr Denis O'Mahony (Solicitor for Mr McDonnell) Ms Georgia Luscombe (ACCA External Case Presenter) Ms Nyero Abboh (Hearings Officer)</b>
<b>Summary:</b>	<b>Finding of dishonesty and sanction rescinded. Matters to be heard afresh by the Disciplinary Committee.</b>
<b>Costs:</b>	<b>ACCA to make a contribution to Mr McDonnell's cost of €30,000 (euros)</b>

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1. The Committee heard an Appeal by Mr McDonnell from a decision of the Disciplinary Committee ('the DC') made on 29 July 2021, directing that he be excluded from membership. Mr Toner appeared on behalf of Mr McDonnell. Ms Luscombe appeared for ACCA.
2. The Committee had a main bundle of papers containing 631 pages, an Additional Bundle containing 107 pages, a Tabled Additional bundle containing 34 pages and a service bundle containing 16 pages.

### **BRIEF BACKGROUND**

3. Mr McDonnell has been a Member of ACCA since 1985 and a Fellow since November 1990. He holds a Practising Certificate with audit qualification (Ireland). At the relevant time, he was a partner in Firm B. He was responsible for certifying the financial statements which Firm B prepared each year for its client, Client A.
4. In March of each of the years from 2012 to 2015, Mr McDonnell signed a brief document of four lines accompanied by a few pages of accounts. Each of those documents was headed 'Auditors' Report' and began '*In accordance with your instructions, we have audited the financial statements on pages ...*'. It was common ground that in fact no audit (in the sense understood by accountants) had been carried out.
5. The matter was brought to ACCA's attention by Chartered Accountants Ireland in January 2020. After an investigation by ACCA, Mr McDonnell faced the following Allegations:
  1. *Mr Peter McDonnell, a Fellow of the Association of Chartered Certified Accountants (ACCA), signed documents titled 'Auditors' Report' on behalf of Firm B which stated that the financial statements of Client A had been audited when they had not, on:*
    - a. *13 March 2012; and/or*
    - b. *7 March 2013; and/or*
    - c. *5 March 2014; and/or*



because the document did not give an audit opinion or have any of the other attributes of an audit. Mr McDonnell said that he had no reason to be dishonest because an audit was not required for this client. His firm had not charged for an audit.

7. ACCA did not put forward a case that an audit was either required by law or requested by Client A. ACCA also accepted that the documents in question were clearly not statutory audit reports and that Firm B had not expressed an opinion about whether the financial statements gave a true and fair view of Client A's state of affairs and results.
8. The DC found Allegations 1, 2(a), 3 and 4(a) proved. It ordered that Mr McDonnell be excluded from membership and pay costs of £6,753.50 to ACCA.

#### **THE APPEAL**

9. Mr McDonnell applied for permission to appeal on 30 August 2021 but there were several procedural mishaps which meant that permission to appeal was not given until 19 August 2022. The grounds of appeal in Regulation 5(3) on which permission were granted were:
  - (a) *The Committee made an error of fact or law, which would have altered one or more of the Committee's orders;*
  - (c) *The Committee failed to take into account certain relevant evidence, which would have altered one or more of the Committee's orders;*
  - (d) *There is new evidence not previously available, which would have altered one or more of the Committee's findings or orders;*
  - (e) *One or more of the Committee's orders is disproportionate and/or unreasonable;*
10. Ground (a) concerned the application by the DC of the test for a finding of dishonesty as set out in *Ivey v Genting Casinos* [2017] UKSC 67 ('Ivey').
11. Grounds (c) and (d) concerned a report of the Independent Assessor and its conclusion that Mr McDonnell posed no risk to the public. The existence of this document was known at the hearing but the DC did not call for it and therefore

- did not consider it.
12. Ground (e) related to the order for exclusion which Mr McDonnell claimed was disproportionate and/or unreasonable.
  13. Both parties agreed that the most important issue in the appeal was the DC's finding of dishonesty.
  14. This Committee gave permission for Mr McDonnell to give oral evidence on oath and he was cross-examined. His evidence did not introduce new matters but reminded this Committee of the evidence he gave to the DC about the dishonesty issue.
  15. The submissions in support of Mr McDonnell's appeal were set out in writing and supplemented by brief oral submissions from Mr Toner on the key issues. The central point made in relation to the finding of dishonesty was that the DC seemed to have proceeded on the basis of supposed admissions which in fact Mr McDonnell had not made.
  16. Ms Luscombe's submissions were also succinct. She submitted that the DC had taken into account the evidence given by Mr McDonnell at the hearing, had been properly directed as to the *Ivey* test and had applied it correctly. She submitted that the DC had carried out a detailed analysis of Mr McDonnell's state of knowledge and that no mistake of fact or law was made.
  17. This Committee considered the submissions of both counsel and took advice from the Legal Adviser, which it accepted.

## **DECISION ON APPEAL**

### **Ground (a): dishonesty**

18. Under ACCA's bye-law 7(d), the relationship between the Association and its members is governed by the law of England and Wales. It was common ground that under the law of England and Wales the test for dishonesty is that set out in *Ivey* at paragraph 74:

*... When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the*

*facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.*

19. In the reasons it gave for its decision on allegation 2(a) the DC started by saying:

*36. ... It was necessary for the Committee to determine whether, when he signed the reports on behalf of Firm B and which formed the substance of Allegation 1, Mr McDonnell knew an audit of the financial statements had not been carried out by Firm B.*

20. However, those facts were not in dispute. It was Mr McDonnell's own case that no audit was performed by Firm B. Answering 'yes' to the question which the DC posed to itself did not assist in deciding the first question identified in *Ivey*, namely the actual state of Mr McDonnell's knowledge or belief as to the (relevant) facts. The relevant question was whether he knew that he was signing a statement that an audit had been carried out or (as he says) whether he signed each document without reading it believing it was merely a routine confirmation of financial statements. He knew that no audit had been carried out but did he know that he was making a written statement to the contrary?

21. Later the Committee said:

*38. ... He had accepted that the documents he had signed every March for a period of four years were false. He knew that no audit work had been undertaken.*

22. This was simply a restatement of the agreed facts. The documents were 'false' in the sense that they were not audit reports. However, it was clear from the transcript that Mr McDonnell did not admit that he *knowingly* made false

statements.

23. The key reasoning seems to have been in paragraph 39:

*39. The Committee simply did not find it plausible that, on four separate occasions, over a period of four years, Mr McDonnell signed an identical document and that it was simply a mistake and as a result of carelessness. Each document referred very clearly in the heading and in the body of the document to the fact that it related to audit work having been undertaken and Mr McDonnell signed it on behalf of Firm B as registered auditors and accountants.*

24. The DC seems to have assumed that since Mr McDonnell signed the documents he must have known, or be deemed to know, the contents of them. In some contexts, signing a document will bind the person who signs whether or not the document has been read. That does not apply in this context where the issue was dishonesty. As Ivey makes clear that must be based on actual knowledge. The DC was entitled to question the plausibility of Mr McDonnell's defence but first they should have considered whether ACCA had proved its case. No reason had been suggested for why Mr McDonnell, a man with a long and unblemished career, should wish to publish such an obvious and pointless falsehood. That could also be regarded as implausible. The DC reasons do not indicate that they considered the issue of whether ACCA had proved that Mr McDonnell knowingly published a statement that he knew (at the time) to be false.

25. The DC's conclusion was:

*41. The Committee found, on the balance of probabilities, that, when he signed the Auditors' Reports on behalf of Firm B in the years 2012 to 2015, Mr McDonnell knew that an audit of the financial statements of Client A had not been carried out.*

26. This was merely a restatement of the question the DC had erroneously posed at the start of their reasoning. It was not in dispute that at all times, including when signing the documents, Mr McDonnell knew that no audit had been carried out. The issue was whether he knew that the document was stating the

contrary. The conclusion in paragraph 41 did not in fact support the finding of dishonesty.

27. This Committee therefore found the first ground of appeal made out. The DC made an error of fact or law in its reasoning which undermined its decision. This Committee consequently had the power to affirm, vary or rescind the finding of dishonesty. It could not affirm it on the evidence available. It considered whether to vary it but decided that this could only be done after a full consideration of the facts. It therefore determined to rescind the finding and order that the matters be heard afresh by the Disciplinary Committee.

**(c) and (d): the Independent Assessor's Report**

28. The bundle before the DC included a letter to Mr McDonnell enclosing the Independent Assessor's Report, but the Report itself was not included. Mr McDonnell was not represented at the hearing and understandably did not press for production of the report. However, in his grounds of appeal it was made clear that he wished to rely on a passage from it. In the last paragraph, the Assessor dealt with the question whether to direct the Investigating Officer to make an urgent application to the Interim Orders Committee for an Interim Order. He declined to do so on the basis that 'there is no evidence to suggest a sufficient risk to the public etc'.
29. Mr Toner submitted that this was evidence available to the DC which they should have considered. It could have influenced their decision on sanction.
30. This Committee agreed that since the Report had been referred to, it should have been included in the bundle in order to give a full picture. However, it also considered that it would have had little or no bearing on the orders made. The Assessor was performing a risk assessment at a particular time. The DC was considering different matters, such as whether an order was necessary to uphold public confidence and maintain standards.
31. Mr Toner also made a point about the Assessor's reference to 'professional oversight'. However, this Committee considered that the Assessor was referring to oversight in the sense of overseeing (or supervising) something and not in the sense of making a mistake. It rejected this submission.



**(e) orders disproportionate**

32. In view of this Committee's decision that the finding of dishonesty must be rescinded, an order for exclusion would clearly be disproportionate or unreasonable and it, too, cannot stand. The Committee determined to rescind it and order that the matters be heard afresh by the Disciplinary Committee.
33. In view of this Committee's conclusions, the costs order that the DC made also cannot stand. Mr McDonnell will have to face another hearing through no fault of his own. The costs order made by the DC is therefore rescinded.
34. The Disciplinary Committee which rehears this matter shall consist of different individuals from the DC which sat on 29 July 2021.

**COSTS OF THE APPEAL**

35. Mr Toner applied for costs totalling €33,025.50. Given that the appeal had succeeded, Ms Luscombe did not oppose the principle that ACCA should make a contribution to Mr McDonnell's costs.
36. As to the amount of costs, Mr Toner submitted that in addition to the costs of this hearing, Mr McDonnell had had to make four applications for leave to appeal due to procedural errors by ACCA. He also submitted that the case was a complex one and that the amount of time claimed for, though high, was justified. The Chair pointed out that the costs were based on a two-day hearing which would in fact finish early on the second day. Mr Toner submitted that there would be no saving in costs to Mr McDonnell because his legal team was committed for the two days.
37. Ms Luscombe conceded that ACCA had made procedural failings which required Mr McDonnell to resubmit his applications through no fault of his own. She queried the high level of costs. She submitted that this was actually a factually simple case. Many of the documents in the bundle were copies of reported cases and similar documents which added to the size of the bundle but should not have incurred significant costs. However, she said that she was not in a position to challenge the number of hours claimed.
38. The Committee was satisfied that the appeal had succeeded entirely and that

Mr McDonnell was entitled to a contribution to his costs.

39. As to the amount of costs, the overall figure seemed high and the Committee accepted that the number of documents in the bundle might be considered excessive. On the other hand, the Committee accepted that this had been a more complex appeal than normal because of the numerous procedural failings, which were not Mr McDonnell's responsibility. It went through some of the details of the costs schedule with Mr Toner and his instructing solicitor, Mr O'Mahoney. Mr O'Mahoney told the Committee that in fact costs for the period August 2021 to February 2022 had not been included in the total because there had been a problem with timesheets. The costs schedule in the bundle was necessarily based on estimates for future costs. Mr O'Mahoney offered to print off a more up to date schedule of costs. This showed that the number of hours spent was slightly less than estimated. On that basis, the Committee assessed the costs at €30,000.
40. The Committee ordered that ACCA make a contribution to Mr McDonnell's costs of €30,000.

**HH Graham White**  
**Chair**  
**21 October 2022**