

CHARTERED PROFESSIONAL ACCOUNTANTS OF ONTARIO
CHARTERED PROFESSIONAL ACCOUNTANTS OF ONTARIO ACT, 2017

APPEAL COMMITTEE

IN THE MATTER OF: An appeal by **THOMAS HAAR** of the Decision and Order of the Discipline Committee, under **Rule 24** of the Rules of Practice and Procedure.

TO: Mr. Thomas Haar

AND TO: The Professional Conduct Committee

DECISION AND ORDER MADE FEBRUARY 28, 2018

DECISION

The tribunal heard and considered the submissions on behalf of the Appellant, Thomas Haar, and on behalf of the Professional Conduct Committee, and dismisses the appeal from the decision of the Discipline Committee regarding Allegation No. 1, and the Order of fine and costs.

ORDER

Mr. Haar is to pay costs related to his appeal to the Appeal Committee fixed at \$11,500, to CPA Ontario within six (6) months from the date this Decision and Order, August 28, 2018.

DATED at Toronto, this 1st day of March, 2018.



Laurence Bookman, CPA, CA
Appeal Committee – Chair

CHARTERED PROFESSIONAL ACCOUNTANTS OF ONTARIO
CHARTERED PROFESSIONAL ACCOUNTANTS OF ONTARIO ACT, 2017

APPEAL COMMITTEE

IN THE MATTER OF: An appeal by **THOMAS HAAR** of the Decision and Order of the Discipline Committee made February 1, 2017, under Section 37 of the Act and Rule 24 of the Rules of Practice and Procedure.

BETWEEN:

THOMAS HAAR

(Appellant)

-and-

CHARTERED PROFESSIONAL ACCOUNTANTS OF ONTARIO
PROFESSIONAL CONDUCT COMMITTEE

(Respondent)

APPEARANCES:

For Thomas Haar: Jason A. Schmidt

For the Professional Conduct Committee: Alexandra E. Hersak

Heard: February 28, 2018

Decision and Order effective: February 28, 2018

Release of written reasons: May 11, 2018

REASONS FOR THE DECISION AND ORDER MADE FEBRUARY 28, 2018

[1] Thomas Haar ("Mr. Haar") appeals a Decision of the Discipline Committee of the Chartered Professional Accountants of Ontario ("CPA Ontario"), dated February 1, 2017. The appeal was heard on February 28, 2018, by this Committee, and was dismissed with reasons to follow. These are those reasons.

I. OVERVIEW

[2] The Discipline Committee proceedings took place over a three-day period – January 30, 31 and February 1, 2017. There were three allegations of professional misconduct against Mr. Haar. At the outset of the hearing, Mr. Haar plead guilty to two of those allegations, which can be summarized as follows:

a) Mr. Haar had performed review engagements of the financial statements of a company

named Jenson Trade Inc. ("JTI"), while his objectivity was impaired by his owning, through his companies, 50% of JTI, and his having made a further investment in JTI that exceeded \$1,000,000 (the "Impaired Objectivity Allegations"); and

- b) Mr. Haar, while acting as accountant for JTI and another company, Silkeborg Inc. ("SI"), directed his client to issue a fictitious invoice to his company, Canada Pallet Corp. ("CPC"), in order to facilitate a tax deduction for CPC (the "Fictitious Invoice Allegations").

- [3] Mr. Haar challenged the remaining allegation, which asserted that he became a receiver over the assets of JTI/SI, and knowingly failed to pay outstanding priority sales tax and payroll source deductions in the amount of \$300,000 (the "Receivership Allegations").
- [4] The Discipline Committee found against Mr. Haar on all three allegations and made sanction and costs orders against him, including revocation, a \$25,000 fine and \$98,000 in costs. Mr. Haar's appeal was restricted to challenging the Receivership Allegation findings, the fine and the costs.

II. FACTS

Facts Regarding the Receivership Allegations

- [5] Mr. Haar had been a member of the CPA Ontario predecessor, the Institute of Chartered Accountants of Ontario, since 1970. He met the complainant, Mr. CJ, in the 1990's and provided accounting services and business advice to CJ for roughly 20 years.
- [6] Mr. Haar had become a secured creditor in CJ's clothing businesses, JTI and SI. Specifically, in late 2005, Mr. Haar, through his company, Oleander Corp., took assignment of a private lender's security. In 2009, following a demand on JTI by TD Bank, CPC purchased the bank's security. Thus, by early 2009, Mr. Haar's companies had a \$1,500,000 secured interest in JTI/SI.
- [7] In 2009, JTI and SI were in a poor financial position and CJ approached Mr. Haar for business advice. Mr. Haar, CJ and CJ's spouse – GJ – met and agreed on a plan to "make the company profitable" and "turn the ownership over to [CJ and GJ]".
- [8] Mr. Haar wrote the plan down in a document that came to be known as the "Kitchen Table Memo". The parties operated under the terms of the Kitchen Table Memo from May to August 2009, and then agreed to part ways.
- [9] Under that memo, amongst other things, GJ was to contribute \$30,000 in capital and act as general manager of the business. Virtually all of JTI/SI's sales were credit card sales. Fifty percent of those sales were to go back into the company to purchase fresh inventory, the balance was to be paid towards ongoing expenses. Sales proceeds were to be transferred, from the credit card proceeds bank account controlled by CJ, to a bank account controlled by Mr. Haar. The plan further stipulated that Mr. Haar would open and control a replacement credit card proceeds bank account (although this transfer of control did not come to pass). Mr. Haar's firm was to administer the payment of CJI/SI's ongoing obligations. Inventory was to be purchased by GJ, but subject to approval by Mr. Haar.

[10] While Mr. Haar managed the payment of JTI/SI obligations, he did not pay anything towards JTI/SI's PST, GST and payroll source deductions, which were in arrears, in the approximate amount of \$300,000 ("priority arrears"). Mr. Haar was aware of the priority arrears obligation, but thought that Canada Revenue Agency might not pursue the company for these liabilities. In other words, the non-payment of the priority arrears was deliberate.

Discipline Committee Decision

[11] The Discipline Committee accepted Mr. Haar's two guilty pleas and found against him on the Receivership Allegations. The findings on the Receivership Allegations were that Mr. Haar's actions amounted to control over "all or substantially all" of JTI/SI's assets, that he was thus a receiver over those assets, and that he knowingly failed to pay the priority arrears.

[12] The Discipline Committee concluded that the misconduct established in regard to the three allegations amounted to a serious breach of the Rules of Professional Conduct. The Discipline Committee ordered that Mr. Haar be reprimanded, that his membership be revoked, that he surrender his membership certificates and that its order and reasons be available to the public. The Discipline Committee also ordered that Mr. Haar be fined \$25,000 and that he pay the costs of the discipline investigation and hearing, in the amount of \$98,500.

III. STANDARD OF REVIEW

[13] Appeals are subject to a standard of review. Appeal tribunals, as a general rule, are not to re-try the cases before them. An appeal panel is to assess the decision under appeal by either a correctness standard or a more deferential standard of reasonableness. In the case of CPA Ontario appeals, the Act directs the Appeal Committee to employ the deferential reasonableness standard (see s. 37 of the Act, especially s. 37 (5)).

[14] When employing a reasonableness standard, an Appeal Committee looks to see if the Discipline Committee's decision was a reasonable one, even if it is not the decision the Appeal Committee would have arrived at if it was re-trying the case. Put in other words, the Appeal Committee is to determine whether the Discipline Committee's decision fell "within a range of possible accessible outcomes, which are defensible in respect of the facts and law" (see *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 1990 at para. 47).

IV. ISSUES ON APPEAL

[15] Recognizing these standards, the issues for the Tribunal are:

- A. Did the Discipline Committee err in finding against Mr. Haar on the "Receivership Allegations?"
- B. Did the Discipline Committee order an excessive fine and excessive costs against Mr. Haar?

V. REASONS FOR DECISION

A. *Did the Discipline Committee err in finding against Mr. Haar on the "Receivership Allegations?"*

- [16] The Appeal Committee finds that the Discipline Committee's decision on the Receivership Allegations was reasonable.
- [17] It was certainly open to the Discipline Committee to find that Mr. Haar had become a "deemed" receiver, in the May to August 2009 period. As noted by the Discipline Committee, one can become a receiver in the absence of a "formal appointment" or a "special designation" (see Discipline Committee Reasons, dated August 11, 2017 ("Discipline Committee Reasons") at para. 77; see also *Colour Box Ltd. (Re)*, [1995] O.J. No. 52 (Gen. Div.) at para. 19).
- [18] The parties agree on the test to be applied for a finding of a receivership, and the Discipline Committee applied that test. Specifically, the Discipline Committee applied Section 243 of the Bankruptcy Insolvency Act, R.S.C. 1985, c. B-3 ("BIA") and considered whether Mr. Haar, by his conduct, took control of "all or substantially all of the inventory of JTI/SI (see Discipline Committee Reasons, para. 77). The parties agreed that inventory was JTI/SI's only significant asset and that, for the purposes of the proceedings, inventory included the proceeds from the sale of the inventory.
- [19] The appellant challenges the Discipline Committee's findings on the Receivership Allegations, primarily on the basis that he did not gain control of "all or substantially all of" JTI/SI's assets. There was evidence that CJ failed to follow the Kitchen Table Memo by, without Mr. Haar's knowledge, failing to forward roughly 40% of the credit card sales proceeds to Mr. Haar. The appellant also pointed out that GJ, not Mr. Haar, maintained managerial control of the day-to-day operations. Mr. Haar only occasionally attended at JTI/SI's place of business.
- [20] The respondent submits that on the whole, the Kitchen Table Memo was a control mechanism that transferred considerable control to Mr. Haar, of JTI/SI's only material asset – the inventory. Thus, Mr. Haar had taken control of substantially all of JTI/SI's assets and became a deemed receiver under the BIA. There was ample evidence to support these submissions. Specifically:
- a) the Kitchen Table Memo directed that GJ manage the JTI/SI operations, answering to Mr. Haar – a secured creditor of JTI/SI;
 - b) sales of inventory were predominantly by credit card transactions and the Kitchen Table Memo established that funds from the sale of inventory were to be transferred to a bank account belonging to one of Mr. Haar's companies;
 - c) the Kitchen Table Memo contemplated further control by Mr. Haar by having credit card sales proceeds deposited directly to an account held by one of his companies, although Mr. Haar left the enterprise before this step was completed;
 - d) the Kitchen Table Memo placed Mr. Haar in the position of being the final authority of all new purchases of inventory;
 - e) Mr. Haar utilized the funds deposited in his company's account – that were not

utilized for the purchases of new inventory – to retire debts as decided by him; and

- f) Mr. Haar changed the beneficiary under the inventory insurance policy, such that proceeds would be paid to him in the event of a fire.

- [21] The Discipline Committee considered the above-noted submissions and was persuaded that Mr. Haar had taken control of "all or substantially all" of JTI/SI's assets, during the May to August 2009 period, and thus became a deemed receiver over those assets. Its decision was based on the facts before it, including the above-noted facts highlighted by the respondent (see Discipline Committee Reasons, paras. 77-78). Having considered the parties' submissions, the facts before it, and applied the law to those facts, the Discipline Committee arrived at a reasonable decision that is deserving of deference.
- [22] As noted above, the knowing failure to pay the priority arrears was acknowledged by Mr. Haar in his evidence. It follows that there is no basis to set aside the Discipline Committee's findings on the Receivership Allegations and the appeal on this issue is dismissed.

B. Did the Discipline Committee order an excessive fine and excessive costs against Mr. Haar?

- [23] Decisions on sanction are also subject to a reasonableness standard of review. In the sanctions context, the Discipline Committee's choice of penalty should not be interfered with unless it is "outside the range of penalty" (see *Granatstein (Re)*, 1990 LNICAO 1, at para. 21) or discloses an "error in principle" such that the punishment "clearly does not fit the crime" (see *Matthews (Re)* 1996 LNICAO 2, paras. 20 – 21).
- [24] Mr. Haar did not appeal the reprimand, revocation or publication sanctions imposed against him. He restricted his penalty appeal to the \$25,000 fine, and argued that if he succeeded on the Receivership Allegation issue, his fine should be reduced. The \$25,000 fine pertained to misconduct on three separate findings. It follows, he argued, that if only two of those findings remained standing, his fine should be reduced accordingly.
- [25] As noted above, the Appeal Committee has dismissed the appeal on the Receivership Allegations. Moreover, the Appeal Committee finds that, in any event, the fine was reasonable in this case. The authorities presented to the Appeal Committee showed a range of fines, in comparable circumstances, of \$5,000 to \$50,000. The misconduct in this case is on the more serious end of the range (especially the Fictitious Invoice Allegations). A \$25,000 fine is well within the range of possible penalties.
- [26] Mr. Haar also appealed the Discipline Committee's order of costs in the amount of \$98,500. The standard of review for costs decisions is also reasonableness, and a costs order will only be set aside on the basis of an error in principle (see *Groia v. The Law Society of Upper Canada*, [2016] O.J. No. 3094 (C.A.) at para. 234). There was no error in principle in the Discipline Committee's decision to order \$98,500 in costs. That amount was within a range of reasonable outcomes. Specifically:
 - a) Costs were sought on a partial indemnity basis (50% of actual);
 - b) The standard request of the Professional Conduct Committee ("PCC") is

indemnification of 2/3 of the investigation and prosecution costs, rather than the 50% sought in this case;

- c) The investigation was significant resulting in an investigation report 69 pages in length;
- d) The document brief associated with the investigation report was substantially the same as that relied upon at the hearing and were therefore all relevant to the evidence heard;
- e) An expert witness was required and therefore retained; and
- f) Considerable PCC counsel time was spent on "costs thrown away" associated with changes to Mr. Haar's intended plea.

VI. COSTS ON APPEAL

[27] The Tribunal considered whether costs of the appeal should be ordered and, if so, in what amount?

[28] The Appeal Committee has jurisdiction to award costs of the appeal (see Section 38 (2) of the Act). The respondent filed a costs outline indicating that, in preparation for this appeal, it incurred partial indemnity costs, disbursements and taxes, totaling \$22,957.55. Consistent with the approach it took before the Discipline Committee, the respondent seeks only 50% of those costs on this appeal. This is a reasonable request, in the circumstances.

[29] The appeal is dismissed. Mr. Haar is to pay costs related to this appeal in the amount of \$11,500, inclusive of disbursements and taxes, to CPA Ontario, on or before August 28, 2018.

Dated at Toronto this 11th day of May, 2018



Laurence Bookman, CPA, CA
Appeal Committee –Chair

Members of the Tribunal

Stewart Hardacre, CPA, CMA
William Schmidt, CPA, CA
Michael Stebila, CPA, CA
Virendra Sahni (Public Representative)

Independent Legal Counsel

Richard Macklin
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