DISCIPLINARY ORDERS AND REGULATORY DECISIONS

Date published: 5 February 2014

**Disciplinary orders**

Disciplinary Committee tribunal orders

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<tr>
<td>1</td>
<td>Mr James Philip Stansfield FCA</td>
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<td>Mr Philip Douglas Oddy FCA</td>
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<td>7</td>
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Appeal Committee panel orders

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Cessation of Membership

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Investigation Committee consent orders

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<td>12</td>
<td>Mr Andrew Cooper ACA</td>
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<td>S C Devani &amp; Co</td>
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Mr James Philip Stansfield FCA of The Downings, Church Lane, South Cerney, Cirencester, Gloucestershire, GL7 5TT

A tribunal of the Disciplinary Committee made the decision recorded below having heard a formal complaint on 19 November 2013

Type of Member Member

Terms of complaint

The complaint is that Mr James Philip Stansfield is liable to disciplinary action under Disciplinary Bye-law 4(1)(c)(c)

‘...committed a breach of the bye-laws or of any regulations or has failed to comply with any order, direction or requirement made, given or imposed under them’

because:

1 Between 1 October 2007 and 21 November 2012 Mr J Stansfield FCA engaged in public practice without holding a practising certificate, contrary to Principal Bye-law 51a.

2 Between 1 October 2007 and 11 November 2012 Mr J Stansfield FCA engaged in public practice without professional indemnity insurance as required by Regulation 3.1 of the Professional Indemnity Insurance Regulations.

Hearing date

19 November 2013

Previous hearing date(s)

None

Pre-hearing review or final hearing Final Hearing

Complaint found proved Yes

All heads of complaint proven Yes

Sentencing order

a) Reprimand
b) Fine of £500
c) Costs of £1000
Procedural matters and findings

Parties present
Investigation Committee (IC)

Represented
Mr Jowett of the ICAEW represented the IC

Hearing in public or private
The hearing was in public

Decision on service
In accordance with regulations 3-5 of the Disciplinary Regulations, the tribunal was satisfied to service

Documents considered by the tribunal
The tribunal considered the documents contained in the IC’s bundle together with documents from the defendant.

Findings on preliminary matters
The tribunal took into account an email dated 18 November 2013 in which Mr Stansfield indicated that he was aware of the hearing date but did not intend to attend. Thus, the tribunal considered it appropriate to proceed in his absence.

Issues of fact and law

1. Mr Stansfield was identified by ICAEW as potentially being engaged in public practice without holding a practising certificate.

2. Mr Stansfield has never held a practising certificate. He worked as a finance director until September 2007 when he retired. Following his retirement friends asked him to assist with accountancy work. This work included the preparation and submission of accounts and VAT returns in addition to help with personal tax returns. In total Mr Stansfield acted for three businesses since 1 October 2007 and total annual fees have been less that £2,000 per annum.

3. Mr Stansfield has never advertised his services and says he has no intention of taking on additional work. He assumed that due to the low level of fees and the fact that he was not engaging in public practice he did not need a practising certificate.

4. Mr Stansfield has since applied for and obtained a practising certificate which has been in place since 21 November 2012.

Conclusions and reasons for decision

5. The tribunal found the complaint proven on the defendant’s own admission.

6. Principal Bye-Law 51a requires a member who engages in public practice to hold a practising certificate. The original Council Statement on Public Practice came into force before 1 January 2008. This was updated and became the new Council statement on engaging in public practice effective from 1 January 2008.

7. Prior to 1 January 2008 a member would be regarded as being engaged in public practice where he or she personally and directly provided or held himself or herself out to provide accountancy services to the public as an individual principal or as a partner in a firm providing such services to the public. Under the new Council Statement, the position is that a member will be regarded as being engaged in public practice if he is a principal in a
public practitioner (being an entity which provides accountancy services to clients in anticipation of reward).

8. Mr Stansfield has been engaging in public practice between 1 October 2007 and 21 November 2012 without holding a practising certificate. This arose due to Mr Stanfield's misunderstanding of the regulations.

9. Regulation 3.1 of the Professional Indemnity Insurance Regulations requires a firm engaged in public practice to arrange qualifying insurance. This requirement has been in place since August 1991.

10. Mr Stansfield did not have PII in place. He did not consider he required this due to his low income and lack of advertising. PII was put in place from 12 November 2012.

Matters relevant to sentencing

11. In mitigation, Mr Stansfield has now obtained a practising certificate and PII. The tribunal accepted that the breaches had not been deliberate. Mr Stansfield had no prior disciplinary record. It was however an aggravating feature that the breaches had gone on for five years.

12. The tribunal reminded itself that it was a cornerstone of the professional standards guaranteed to the public, that a chartered accountant would both have a practicing certificate and thereby be subject to regulation by ICAEW and professional indemnity thereby protecting the public if claims were to arise. Whilst the amounts of fees earned by the defendant were low, this did not mean that he could practise as a chartered accountant but beyond the reach of professional regulation. It is incumbent on chartered accountants to make themselves aware of the basic regulatory requirements imposed upon them. Thus, he should have been aware of the need for both the practising certificate and PII and ignorance, whilst mitigation, was no excuse.

Sentencing Order

13. The tribunal took into account its Guidance on Sentencing and imposed the following sentencing order:

   a) Reprimand
   b) Fine of £500
   c) Costs of £1000.

Decision on publicity

14. Publicity with names

   Chairman  Mr David Wilton FCA
   Accountant Member  Mr Michael Swift FCA
   Non Accountant Member  Mr Richard Woodman
   Legal Assessor  Ms Melanie Carter
A tribunal of the Disciplinary Committee made the decision recorded below having heard a formal complaint on 19 November 2013

**Type of Member**
Member

**Terms of complaint**

The complaint is that Mr Philip Douglas Oddy is liable to disciplinary action under Disciplinary Bye-law 4(1)(c)

‘…committed a breach of the bye-laws or of any regulations or has failed to comply with any order, direction or requirement made, given or imposed under them’

because:

1. Between 10 July 2012 and 22 February 2013, Mr P D Oddy FCA failed to submit the annual return as at 31 January 2012 for Philip Oddy contrary to Practice Assurance Regulation 8.

2. Between 10 January 2012 and 22 February 2013, Mr P D Oddy FCA engaged in public practice without professional indemnity insurance as required by Regulation 3.1 of the Professional indemnity Regulations.

**Hearing date**

19 November 2013

**Previous hearing date(s)**

None

**Pre-hearing review or final hearing**
Final Hearing

**Complaint found proved**
Yes

**All heads of complaint proven**
First head of complaint was found proven
Second head of complaint was found not proven

**Sentencing order**

a) Reprimand
b) Fine of £500

**Procedural matters and findings**

**Parties present**
Investigation Committee (IC)

**Represented**
Mr Jowett of ICAEW represented the IC

**Hearing in public or private**
The hearing was in public

**Decision on service**
In accordance with regulations 3-5 of the Disciplinary Regulations, the tribunal was satisfied to service
Documents considered by the tribunal

The tribunal considered the documents contained in the Investigation Committee’s IC’s bundle

Findings on preliminary matters

The tribunal noted that Mr Oddy’s registered address had changed during the course of the ICAEW’s disciplinary processes. However, he had been written to at his new registered address on 21 August 2013 indicating the time and venue for the hearing. Nothing had been heard from him since and the tribunal decided in the circumstances that it would be appropriate to proceed in the defendant’s absence.

Issues of fact and law

1. Mr Oddy is a sole practitioner, trading as Philip Oddy.

2. The annual returns team (ART) identified that Philip Oddy was due an annual return. On 7 December 2011 the ART sent the practice assurance annual returns to the distribution centre for issuing to all firms under the practice assurance scheme.

3. The return should have been completed by Mr Oddy for the firm as at 31 January 2012 and then submitted by 29 February 2012. ICAEW’s attempted to contact Mr Oddy included letters, emails and telephone calls. He did not respond.

4. The secretary to the PAC wrote to Mr Oddy on 18 June 2012. She sent copies of her letter by recorded delivery to his primary address at Albion House and his secondary address at Cornmill Lane. Mr Oddy was required to provide the annual return by 9 July 2012 to avoid the matter being referred to the Professional Conduct Department.

5. The letter that was sent to Mr Oddy’s primary address was returned on 16 July 2012 by Royal Mail stating that it was “not called for”.

6. The Practice Assurance Committee decided that the issue of the outstanding return should be referred to the Investigation Team.

7. A case manager wrote to Mr Oddy on 6 September 2012 requesting that Mr Oddy submit the annual return for the firm.

8. No response was received from Mr Oddy and so he was sent letters and email reminders. The case manager tried to ring Mr Oddy on 12 October 2012 using the number on ICAEW’s records but the call was not answered.

9. In failing to submit the annual return Mr Oddy did not confirm the position in relation to the firm’s professional indemnity insurance (PII). The Practice Assurance Annual return for the previous year at 31 January 2011 shows that Mr Oddy renewed his PII on 10 January 2011. His PII would have therefore expired on 9 January 2012.

10. Professional indemnity insurance regulation 3.1 states that:

   “A firm must:

   b. Take reasonable steps to meet claims arising from being in public practice; and

   c. Arrange qualifying insurance which meets the limits in regulation 3.2."
11. Mr Oddy had emailed on June 2013 to say that “I retired and ceased trading as a chartered accountant at the end of November 2011 and no longer wish to be a member of the Institute. As a consequence, I have not paid membership fees for the year 2012”. The tribunal took the view that Mr Oddy’s evidence was that, being retired, he was not in public practice. It decided to give Mr Oddy the benefit of the doubt in this regard, and conclude that PII was not therefore required.

Conclusions and reasons for decision

12. The tribunal found the first head of complaint proven and the second head, not proven. Thus, the complaint was proven in part.

13. Practice assurance regulation 8 states that:

“Member firms and PC holders shall supply any information requested by ICAEW under the PA scheme (whether in the annual return or otherwise) promptly and in accordance with the terms specified.”

14. The practice annual return as at 31 January 2012 was due on 29 February 2012 and Mr Oddy has not submitted the completed return for his firm. In doing so, he is in breach of the Practice assurance regulations. By failing to submit the annual return, Mr Oddy has not provided evidence that his firm also has appropriate PII cover.

15. By reason of the above matters, Mr Oddy is in breach of Practice Assurance Regulation 8 and therefore Disciplinary Bye-law 4(1)(c).

16. In light of the tribunal’s findings at paragraph 11, it decided that the second head of the complaint was not proven.

Matters relevant to sentencing

17. The defendant had no prior disciplinary record. The tribunal took into account as a factor in mitigation that he had ceased trading and believed he did not need to send in an annual return. Nevertheless, it was incumbent upon him as a member of ICAEW to inform himself as to the regulatory requirements and to keep his regulatory body properly informed as to his professional activities.

18. The tribunal took into account the other case being heard on the same day against Mr Oddy and the sentencing order imposed in that case. The tribunal was mindful that it needed to act proportionately, taking both sets of possible sanctions into account in finalising its overall sentencing orders. The defendant had produced no evidence as to his means.

Sentencing Order

19. The tribunal took into account its Guidance on Sentencing and imposed the following sentencing order:

a) Reprimand
b) Fine of £500
**Decision on publicity**

20. Publicity with names.

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<tr>
<th><strong>Chairman</strong></th>
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<td>Mr Richard Woodman</td>
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<tr>
<td><strong>Legal Assessor</strong></td>
<td>Ms Melanie Carter</td>
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Mr Philip Douglas Oddy FCA of
7 Cornmill Lane, Bardsey, Leeds, LS17 9EQ

A tribunal of the Disciplinary Committee made the decision recorded below having heard a formal complaint on 19 November 2013

Type of Member Member

Terms of complaint

The complaint is that Mr Philip Douglas Oddy is liable to disciplinary action under Disciplinary Bye-law 4.1.a in respect of the 3rd, 4th and 6th heads of complaint in that

‘…in the course of carrying out professional work or otherwise he has committed any act or default likely to bring discredit on himself, the Institute or the profession of accountancy’

and

4.1.c in respect of the 1st, 2nd and 5th heads of complaint

‘…committed a breach of the bye-laws or of any regulations or has failed to comply with any order, direction or requirement made, given or imposed under them’

because:

1 Between 12 September 2011 and 13 November 2012, Mr P Oddy, FCA failed to respond to the Quality Assurance Department’s Closing Record of Findings in breach of Practice Assurance Regulation 8.

2 Between 6 January 2012 and 13 November 2012, Mr P Oddy FCA failed to respond to a letter from the Practice Assurance Committee secretary in breach of Practice Assurance Regulation 8.

3 Between on and around 25 April 2007 and 20 June 2012, Mr P Oddy FCA failed to comply with the following undertakings made to QAD:
   a. That he would improve the standard of the statutory accounts by obtaining an accounts disclosure checklist.
   b. That he would ensure all clients were advised of the basis of calculating fees, in accordance with section 240 of the Code of Ethics and the complaints procedure for Philip Oddy, in accordance with Disciplinary Bye-Law 11.

4 Between 15 December 2007 and 20 June 2012, Mr P Oddy FCA, breached the Money Laundering Regulations 2007, in that he failed to document risk assessments, client due diligence and monitor his firm’s compliance with the Money Laundering Regulations 2007.

5 Between 10 January 2011 and 31 July 2011, Mr P Oddy FCA engaged in public practice without professional indemnity insurance as required by Regulation 3.1 of the Professional Indemnity Insurance Regulations.

6 Between 3 April 2007 and 25 August 2011 P Oddy FCA, failed to register his firm, Philip Oddy, with the Information Commissioner as required by the Data Protection Act 1998.
Hearing date
19 November 2013

Previous hearing date(s)
None

Pre-hearing review or final hearing
Final Hearing

Complaint found proved
Yes

All heads of complaint proven
Yes

Sentencing order
a) Severe reprimand
b) Fine of £5750
c) Costs of £4250

Procedural matters and findings

Parties present
Investigation Committee (IC)

Represented
Mr Jowett of ICAEW represented the IC

Hearing in public or private
The hearing was in public

Decision on service
In accordance with regulations 3-5 of the Disciplinary Regulations, the tribunal was satisfied to service

Documents considered by the tribunal
The tribunal considered the documents contained in the IC’s bundle

Findings on preliminary matters
The Tribunal noted that Mr Oddy’s registered address had changed during the course of ICAEW’s disciplinary processes. However, he had been written to on 21 August 2013 at his new address indicating the time and venue for the hearing. Nothing had been heard from him since and the tribunal decided in the circumstances that it would be appropriate to proceed in the defendant’s absence.

Issues of fact and law

Introduction
1 Mr Oddy is a sole practitioner, trading as Philip Oddy.

2 On 19 August 2011, Mr Oddy received a visit by the Quality Assurance Department (QAD). The firm was selected for a Practice Assurance visit because the 2011 annual return, which was due by 28 February 2011, had not been submitted.

3 The QAD reported on a number of concerns which were referred to the Practice Assurance Committee (PAC). The report was sent to Mr Oddy by the secretary to the PAC on 9 December 2011. No response was received.
1st Head of Complaint – failure to respond to the QAD

4 Regulations 8 of the Practice Assurance Regulations provides as follows:

“Member firms and PC holders shall supply any information requested by ICAEW under the PA scheme (whether in the annual return or otherwise) promptly and in accordance with the terms specified.”

5 In their report to the PAC, QAD confirmed that closing meeting notes were sent to Mr Oddy on 19 August 2011 but he had not responded to them. QAD sent reminders, phoned and emailed him over the next few months. Mr Oddy replied on 7 November 2011 by email stating that he was now in a position to respond the next day.

6 On 8 November 2011, Mr Oddy emailed QAD and said that he was having difficulty opening the file and this would delay his reply until 9 November 2011. QAD sent the file containing the closing meeting notes on a different version of Microsoft Word on 14 November 2011, but no response was received.

7 QAD also attempted to contact Mr Oddy to arrange a follow up visit at the request of the PAC. On 28 February 2012 QAD wrote to Mr Oddy to inform him of a visit arranged for 12 June 2012. A reminder was sent on 3 April 2012, but Mr Oddy did not reply and the visit was cancelled.

8 Following this, a ‘Door Step’ visit was made by a QAD reviewer to Mr Oddy’s office on 23 May 201. The reviewer said that the premises looked neglected.

“There were cobwebs over the door and a lock so it appears Mr Oddy is not operational from this particular office. There was a curtain shop in the same block of offices but they were unaware of what has happened to him or who he is.”

9 QAD did not receive any further communication from Mr Oddy regarding the closing meeting notes or the PAC-requested follow up visit.

2nd head of Complaint – failure to respond to a letter from the PAC

10 On 9 December 2011 the PAC secretary wrote to Mr Oddy for further information following the QAD visit in August 2011. He was asked to respond by 6 January 2012.

11 Mr Oddy did not reply and on 9 January 2012 the PAC secretary sent a reminder. He was told that if he did not reply by 23 January 2012 his failure to respond would be referred to the PAC. No response was received from Mr Oddy.

3rd head of Complaint – failure to comply with undertakings

12 QAD previously visited Mr Oddy on 3 April 2007 and highlighted its findings regarding the standard of corporate accounts and the use of an accounts disclosure checklist and notifying clients in writing of the basis of fees and the complaints procedures. On 25 April 2007 Mr Oddy emailed his replies to QAD’s findings, confirming that he would rectify matters. He failed to do so and these matters were noted as ongoing failings at the subsequent 2011 QAD visit.

4th head of Complaint – failure to comply with the MLR’s

13 Following its visit in August 2011, QAD reported in respect of the Money Laundering Regulations that Mr Oddy did not document a risk assessment or client due diligence on all
his clients and that periodic reviews of the firm’s compliance with the Money Laundering Regulations 2007 had not been carried out.

14 Mr Oddy has not informed ICAEW what action he has taken or intends to take to address these issues.

5th head of complaint – practising without PII

15 Regulation 3.1 of the Professional Indemnity Insurance Regulations states the following:

“A firm must:

   a. take reasonable steps to meet claims arising from being in public practice;

   and

   b. arrange qualifying insurance which meets the limits in regulation 3.2”

16 The QAD reported in its summary of findings that the firm had professional indemnity insurance (PII) in place but there was a gap in cover from 10 January 2011 to 31 July 2011.

17 Mr Oddy explained that this was caused by a change of brokers and was asked to provide a copy of the proposal form and evidence of PII cover.

18 No further information or any explanations for the gap in PII cover have been provided.

6th head of complaint – failing to register the firm in accordance with DPA

19 The DPA requires firms handling personal data to be registered with the Information Commissioner. Paragraph 17(1) of the Data Protection Act states the following:

“Subject to the following provisions of this section, personal data must not be processed unless an entry in respect of the data controller is included in the register maintained by the Commissioner under section 19 (or is treated by notification regulations made by virtue of section 19(3) as being so included).”

20 QAD visited Mr Oddy on 3 April 2007 and highlighted that he was not registered with the Information Commissioner under the Data Protection Act 1998.

21 On 25 April 2007, Mr Oddy replied that he had applied for registration. QAD visited Mr Oddy again on 19 August 2011 and noted that DPA registration was not in place. Mr Oddy was invited to comment but he has not replied to any of ICAEW letters.

22 A search of the Data Protection Register was carried out on 8 June 2012 and it was noted that Mr Oddy obtained DPA registration on 26 August 2011.

Conclusions and reasons for decision

23 The tribunal found the complaint proven on all heads.
1st and 2nd head of Complaint – failure to respond to a QAD closing meeting notes and letter from the PAC secretary

24 In failing to respond to the QAD closing meeting notes, and in failing to reply to the PAC secretary’s letter dated 9 December 2011, Mr Oddy is in breach of Practice Assurance Regulations 8.

3rd head of complaint – failure to comply with undertakings

25 Mr Oddy gave an undertaking to QAD in 2007 that disclosure reference material would be used during the completion of statutory accounts. However, the QAD reviewer visiting in 2011 concluded that there was still inadequate disclosure in his clients’ company accounts and saw no evidence of a disclosure checklist in use, suggesting that reference material had not been obtained and applied as promised.

26 Mr Oddy also confirmed to QAD in 2007 that he would update the firm’s engagement letters to include the basis of fees and the complaints procedures next time work is undertaken. The 2011 visit showed that not all clients had been notified in writing of these terms as is required.

27 Mr Oddy has not told ICAEW what action he has taken or intends to take to address the issues highlighted by the QAD or why he failed to comply with the undertaking he had provided. Mr Oddy has failed, over a period of 4 years, to comply with these undertakings.

4th head of complaint – failure to comply with the MLR’s

28 ICAEW member firms are required to comply with the Money Laundering Regulations.

29 Regulations 7 (1) (a) and 8 (1) of the Money Laundering Regulations 2007 provides that members engaged in practice should observe the following:

(i) apply customer due diligence measures when they establish a business relationship or when they carry out an occasional transaction and;

(ii) conduct on-going monitoring of a business relationship.

30 Mr Oddy had no procedures in place to carry out due diligence on clients, or conduct on-going monitoring and had not conducted regular compliance reviews. In doing so, he was in breach of Regulations 7 and 8 of the Money Laundering Regulations 2007.

5th head of complaint – practising without PII

31 Mr Oddy was engaged in public practice and did not obtain qualifying insurance between 10 January 2011 and 31 July 201. In doing so he has breached regulation 3.1 of the Professional Insurance Regulations.

6th head of complaint – failing to register the firm in accordance with the Data Protection Act 1998 (DPA)

32 Mr Oddy was engaged in public practice and by reason of this a data controller, but was not registered under the Data Protection Act 1998 between 3 April 2007 and 25 August 2011.

33 The tribunal took the view that the matters at heads of complaint 3, 4 and 6 constituted conduct which would be likely to bring discredit upon the defendant, the Institute and the profession. He was as such in breach of Disciplinary Bye-law 4(1)(a). The Tribunal was
also separately satisfied as to the alleged breaches under heads 1, 2 and 5 such that Disciplinary Bye-law 4(1)(c) was proven. Thus, the complaint was proven on all heads.

**Matters relevant to sentencing**

34 Mr Oddy had no prior disciplinary record. There did not appear to be any mitigation.

35 The matters underlying the various breaches of Bye-laws indicated a worryingly low standard of work and an almost complete lack of willingness to work with ICAEW to improve the situation. Albeit the fees earned by the defendant were low, nevertheless the public were entitled to expect a minimum level of standards amongst the profession and for members to work positively to improve where failings are detected. Mr Oddy’s conduct and failure to act would be likely to seriously undermine the view of the profession in the public’s eyes.

36 Mr Oddy is no longer operating from his registered address but he has not informed ICAEW of the change. Early in the investigation ICAEW took steps therefore to communicate with him via his home address, as well as by email (to which he responded on 7 November 2011). His failure to update ICAEW as to his new details was an aggravating feature of the complaint. He has done nothing to cooperate with the IC’s investigation. This was also aggravated by reason of the length of time these matters had been going on, spanning a number of years. It appeared that Mr Oddy had essentially opted out of regulation by ICAEW.

37 The tribunal took into account the other case being heard on the same day against Mr Oddy and the sentencing order imposed in that case. The tribunal was mindful that it needed to act proportionately, taking both sets of possible sanctions into account in finalising its overall sentencing orders. The defendant had produced no evidence as to his means.

**Sentencing Order**

38 The tribunal took into account its *Guidance on Sentencing* and imposed the following sentencing order:

a) Severe reprimand  
b) Fine of £5750  
c) Costs of £4250

**Decision on publicity**

Publicity with names.

**Chairman**  
Mr David Wilton FCA

**Accountant Member**  
Mr Michael Swift FCA

**Non Accountant Member**  
Mr Richard Woodman

**Legal Assessor**  
Ms Melanie Carter  
005962
A tribunal of the Disciplinary Committee made the decision recorded below having heard a formal complaint on 20 November 2013

Type of Member
Member

Terms of complaint

The complaint is that Mr Sean Patrick Kelly is liable to disciplinary action under Disciplinary Bye-law 4.1(a):

"in the course of carrying out professional work or otherwise he has committed any act or default likely to bring discredit on himself, the Institute or the profession of accountancy"

because:

Between 12 December 1999 and 27 April 2008, Mr S Kelly FCA issued 11 audit reports in the name of his former firm when he was no longer a principal of that firm. For the avoidance of doubt, the audit reports referred to above are in respect of the following financial statements:

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Hearing date 20 November 2013

Previous hearing date(s) None

Pre-hearing review or final hearing Final Hearing

Complaint found proved Yes

All heads of complaint proven Yes

Sentencing order Exclusion (with a recommendation that there be no consideration of readmission for 5 years)

Costs of £2,500 payable within 60 days

Procedural matters and findings None

Parties present Annabel Joester for the Investigation Committee ("IC")

Mr Kelly attended in person

Represented As above

Hearing in public or private The hearing was in public

Decision on service In accordance with regulations 3-5 of the Disciplinary Regulations, the tribunal was satisfied as to service.

Documents considered by the tribunal The tribunal considered the documents contained in the IC’s bundle

Introduction

1. Mr Sean Kelly was a founder member and former partner of an accountancy practice based in Galway, Ireland. He ceased to be an active partner of the firm on 30 April 1998, although he did remain as a consultant for two or three years thereafter (but did not sign off any documents).

2. On 21 May 2012, the Office of the Director of Corporate Enforcement ("ODCE") in Dublin wrote to ICAEW’s Professional Conduct Department ("PCD") to report that Mr Kelly had issued audit reports in respect of two companies in the name of the firm when the firm had no knowledge of the audit reports. The firm discovered this when the Companies Registration Office contacted it in relation to another company.

3. The firm investigated other companies who have common directors and discovered that A Limited had also filed audited reports in its name.

4. On 27 September 2011 Mr Kelly admitted to OCDE that he had conducted audits of A Limited without the permission of his former firm. In a letter to ICAEW dated 30 July 2012, Mr Kelly admitted that he signed the audit reports in respect of A Limited for the years ending 31 March 1998 to 31 March 2008 inclusive.

5. Mr Kelly later admitted that he had made an error of judgment but put forward the following mitigating factors:
5.1 he signed the audits because the directors of A Limited are his sister-in-law and her husband;
5.2 the company is very small;
5.3 it has no employees;
5.4 it has no borrowings;
5.5 both its revenue and net profit are tiny; and
5.6 he received no fees for this work.

6. Mr Kelly advised that he had spoken to Mr X of the firm on at least three occasions since September 2011. He explained the situation to Mr X and apologised to him and his co-partner. Since then, Mr X has informed Mr Kelly that he required a letter of apology from the director of A Limited together with the payment of €7,000 from this director to compensate for the time and inconvenience caused.

7. PCD confirmed the formal wording of the complaint to Mr Kelly on 13 September 2012.

The Relevant Regulations

8. The relevant Audit Regulations applicable to companies incorporated in Ireland (applicable to firms) were the December 1995 edition (as amended), which applied until 31 May 2012 (subject to regulation 1.05 and 1.06 of the current edition). The Regulations provide that only responsible individuals (“RI”) can be responsible for and sign an audit report (regulation 4.05). In order to be an RI, the principal or employee must be designated by the qualified individuals of the audit firm and, amongst other things, be allowed to sign audit reports in the name of the firm (regulation 4.06).

9. The Guide to Professional Ethics 1997 provides that a member should behave with integrity which implies fair dealing and truthfulness. Though updated in 2001, the guidance remains broadly the same. The Code of Ethics that applies from 1 September 2006 provides: “A professional accountant should be straightforward and honest in all professional and business relationships.”

The Hearing

10. Mr Kelly admitted the complaint. Ms Joester summarised the complaint and highlighted that Mr Kelly had signed a number of reports (11) and that he had done so knowing that third parties would rely upon them. The tribunal found the complaint to be proved. Upon being asked, Ms Joester informed the tribunal that Mr Kelly had one disciplinary offence in 1997 which related to making misleading statements relating to the filing of returns.

11. The tribunal offered Mr Kelly the opportunity to put forward any submissions on mitigation. Mr Kelly said that he didn’t really have any, he explained that he was embarrassed and he apologised. He confirmed that he had not been pressured into signing the audits. He said that whilst he had not read the sentencing guidelines he anticipated that he might be excluded. He said that he was very disappointed but recognised the seriousness of his breaches.

Conclusions and Sentencing

12. The tribunal referred itself to the Guidance on Sentencing (August 2013). It considered that the relevant section of the guidance was Section 12 (Ethical). It decided that the breach fell
within the “very serious – blatant category” for which the starting point was exclusion. The tribunal considered that there were a number of aggravating factors:

12.1 Mr Kelly’s previous offence was found proved just over two years before he first wrongly signed an audit report. Hence, the importance of not acting in a misleading way should have been fresh in his mind.

12.2 He had not been pressured into signing the reports.

12.3 He had deliberately misled third parties (clients in Belgium).

12.4 He had breached eleven times, which amounted to a course of conduct.

13. He had misled his own firm. There were the following mitigating factors:

13.1 No loss had been caused to the firm, the client or the public.

13.2 Mr Kelly had not gained financially form the breach – he had not been paid.

13.3 He had co-operated with ICAEW in its investigations.

13.4 He had apologised and taken the time to attend the tribunal hearing.

**Sentencing Order**

14. The tribunal ordered as follows:

   (a) Mr Kelly is excluded (with a recommendation that he not be considered for readmission for 5 years)

   (b) He is ordered to pay the IC’s costs assessed at £2,500 within 60 days.

**Decision on publicity**

Publication with name

<table>
<thead>
<tr>
<th>Chairman</th>
<th>Mr Richard Lea FCA</th>
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<tr>
<td>Accountant Member</td>
<td>Mr Martin Ward FCA</td>
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<td>Non Accountant Member</td>
<td>Mr Peter Williamson</td>
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<td>Legal Assessor</td>
<td>Mr Jonathan Lewis</td>
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A tribunal of the Disciplinary Committee made the decision recorded below having heard a formal complaint on 27 November 2013

Type of Member
Member

Terms of complaint

The complaint is that Mr Richard Geoffrey Hough is liable to disciplinary action in respect of the 1\textsuperscript{st} head of complaint under Disciplinary Bye-law 4(1) (a)

‘...in the course of carrying out professional work or otherwise he has committed any act or default likely to bring discredit on himself, the Institute or the profession of accountancy’

And in respect of the 2\textsuperscript{nd} head of complaint under Disciplinary Bye-law 4(1) (c)

‘...committed a breach of the bye-laws or of any regulations or has failed to comply with any order, direction or requirement made, given or imposed under them’

because:

1. On the following dates Mr R Hough ACA provided letters to a mortgage provider in which he confirmed his opinion that the income was sustainable when he had not carried out sufficient or any steps to verify that information was correct.
   - On 16 September 2009 in respect of client 1
   - On 21 January 2010 in respect of client 2
   - On 9 March 2010 in respect of client 1

2. Between 14 August 2008 and 30 May 2012, Mr R G Hough ACA failed to comply with regulation 10 of the Clients’ Money Regulations in that he paid client monies totalling £98,170.30 into his firm’s office account.

Hearing date
27 November 2013

Previous hearing date(s)
None

Pre-hearing review or final hearing
Final Hearing

Complaint found proved
Yes

All heads of complaint proven
Yes

Sentencing order
(i) Severe reprimand; (ii) fine of £6,000
Procedural matters and findings

Parties present
Mr Hough was present.

Represented
Mr Hough represented himself; the IC was represented by Ben Jowett.

Hearing in public or private
The hearing was in public.

Decision on service
In accordance with regulations 3-5 of the Disciplinary Regulations, the tribunal was satisfied to service.

Documents considered by the tribunal
The tribunal considered the documents contained in the Investigation Committee’s (IC’s) bundle together with the defendant’s Regulation 13 answers.

The Investigation Committee’s (IC’s) case

Head One

1. The defendant confirmed his opinion to a mortgage provider that the income of two clients who had applied for mortgages (one of whom he had never met, and the other he had met only once) was sustainable, when he had not carried out sufficient or any steps to verify that that was correct.

2. The defendant actually used data supplied by another client. In transpired that both mortgage applications to which the opinions applied were fraudulent. There is no allegation that the defendant conspired in that fraud or acted dishonestly. The defendant was naive and lacked adequate professional scepticism.

Head Two

3. Between 14 August 2008 and 25 May 2012, the defendant received 43 items of client money totalling £98,170.30 into his firm’s office account in breach of Regulation 10 of the Clients’ Money Regulations. While the money was not left in the office account for long, and all was paid away to the clients, the money ought not to have been posted in the office account to begin with.

4. An aggravating factor was that the defendant admitted subsequently that he was unaware of the existence of the Clients’ Money Regulations and had not understood that the money (which comprised tax refunds made by HMRC) ought to have been paid into a client account. At the relevant time, the defendant’s firm had no client account.

Issues of fact and law

5. The tribunal found the complaint proved on the defendant’s own admission. No issues of fact or law fell to be determined.

Conclusions and reasons for decision

Head One

6. The defendant has admitted confirming an opinion to a financial institution as to the sustainability of the income of two clients when he had no plausible evidence to support that opinion. It is not alleged that the defendant was dishonest or in any way conspired with
the clients, who, it turned out, were fraudsters. The defendant ought to have been one of
the professional bastions protecting the public (in this case, the financial institutions) from
those who are intent on dishonesty. The public places great trust in members of ICAEW in
this regard. However, his naivety, lack of professional scepticism and carelessness meant
that he was not. This was serious professional misconduct.

Head Two

7. The defendant obtained for his clients a series of tax rebates. He received them from
HMCR into his firm’s account when, obviously, they should have been posted in a client
account. While there is no question that the defendant did this with improper motive, he
clearly did so out of remarkable and unacceptable ignorance both of the fact that he was
handling client money and that he ought to have had a client account. This was serious
professional misconduct.

Matters relevant to sentencing

8. The tribunal saw no reason to depart from the Guidance on Sentencing and ensured that
no lesser penalty should be imposed.

9. In respect of both heads, mitigating factors were: (i) the defendant’s clean disciplinary
record; (ii) there was no dishonest motive; (iii) the admission of liability.

10. In respect of the first head, additional mitigating factors were: (i) the defendant had
compensated the mortgagees with a reimbursement of most of their fees.

11. In respect of the second head, additional mitigating factors were: (i) the money was in the
defendant’s office account for a short period of time; (ii) there was no personal gain; (iii) the
defendant has taken the remedial step of creating a client account to reduce the risk of the
same error occurring again.

12. In respect of the first head only, aggravating factors were: (i) the mortgage provider
suffered loss as a result of the defendant’s action; (ii) the repeated occasions on which the
misconduct took place.

13. In respect of the second head, aggravating factors were: (i) the amount of money and its
numerous incidences involved.

14. Insofar as it is instructive to breakdown the fine, the tribunal allocates £6,000 to the first
head and £1,000 to the second.

Sentencing Order

(i) Severe reprimand
(ii) Fine £7,000
(iii) Costs £4,300

Decision on publicity

Publication with name.
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<tr>
<th>Role</th>
<th>Name</th>
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<tr>
<td>Chairman</td>
<td>Mr Paul Brooks</td>
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<tr>
<td>Accountant Member</td>
<td>Mrs Marianne Neuhoff FCA</td>
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<tr>
<td>Non Accountant Member</td>
<td>Mr Michael Swift FCA</td>
</tr>
</tbody>
</table>
| Legal Assessor         | Mr Dominic Spenser Underhill            | 008802
Mr Jeremy Peter Crook FCA of
27 St. Peters Street, Stamford, Lincolnshire, PE9 22PF

A tribunal of the Disciplinary Committee made the decision recorded below having heard a formal complaint on 4 December 2013

Type of Member Member

Terms of complaint
The complaint is that Mr Crook is liable to disciplinary action under Disciplinary Bye-law 4(1)(a):

‘...in the course of carrying out professional work or otherwise he has committed any act or default likely to bring discredit on himself, the Institute or the profession of accountancy’

because:

Mr J P Crook FCA:

1. In or around August 2009 on behalf of his client, A Ltd, sent notices of a meeting of creditors pursuant to S98 Insolvency Act 1986 to appoint a creditor’s voluntary liquidator, but did not ensure that the proper formalities of making such appointment were followed, in particular (i) the notice was not advertised in the London Gazette and two local newspapers, and (ii) no person qualified to act as an insolvency practitioner was nominated as liquidator.

2. In or around 18 August 2009 informed creditors by letter of his appointment as Liquidator of A Ltd, when (a) he knew this was untrue and (b) he could not by law be appointed as liquidator because he did not hold an insolvency licence.

3. In or around November 2010 on behalf of his client, B Ltd, of which he was also company secretary, sent notices of a meeting of creditors pursuant to S98 Insolvency Act 1986 to appoint a creditor’s voluntary liquidator, but did not ensure that the proper formalities of making such an appointment were followed, in particular (i) the notice was not advertised in the London Gazette and two local newspapers, and (ii) no person qualified to act as an insolvency practitioner was nominated as liquidator.

4. In a letter dated 25 November 2010 informed creditors of his appointment as Liquidator of B Ltd, when (a) he knew this was untrue and (b) he could not by law be appointed as liquidator because he did not hold an insolvency licence.

Hearing date 4 December 2013

Previous hearing date None

Pre-hearing review or final hearing Final Hearing

Complaint found proved Complaints 2(b) and 4(b) proved on admission

All heads of complaint proven No

Sentencing order Reprimand
Fine £1,000
Costs £2,000

Procedural matters and findings None
Parties present
Mr Crook represented himself
Mr Jowett on behalf of the Investigation Committee (“IC”)

Hearing in public or private
The hearing was in public

Decision on service
In accordance with regulations 3-5 of the Disciplinary Regulations, the tribunal was satisfied to service.

Documents considered by the tribunal
The tribunal considered the documents contained in the IC’s bundle, together with documents relating Mr Crook’s finances, a DBL13 response and additional pages.

Introduction
1. The complaint against Mr Crook concerns two of his clients: A Ltd and B Ltd. The first and third head of complaint are identical as are the second and fourth except that the first and third relate to A Ltd and the second and fourth relate to B Ltd

2. The first and third head of complaint relate to the fact that Mr Crook sent notices of a meeting of creditors pursuant to s.98 of the Insolvency Act 1986 (the “Act”) without complying with necessary formalities.

3. The second and fourth head of complaint relate to the fact that Mr Crook informed creditors by letter of his appointment as a liquidator when (a) he knew this was untrue and (b) he could not by law be appointed as a liquidator as he did not hold an insolvency licence.

Factual Background
4. Mr Crook acted for Mr and Mrs D who ran a hand carwash business. The business operated through a number of successor companies, for which Mr Crook acted as accountant. The companies did not have bank accounts and were operated on a cash basis.

5. This matter was drawn to ICAEW’s attention by South Kesteven District Council, the relevant rating authority. The council was concerned about Mr Crook’s involvement in the liquidation of B Ltd and the successor business, C, it was concerned that the process was an attempt to evade the company’s creditors.

6. ICAEW became aware of Mr Crook’s previous involvement with A Ltd, when he referred to it in his letter of 19 March 2012.

The Law
7. Under the Act, it is the responsibility of the company’s directors to convene a meeting of the company to pass a resolution winding up the company and to call a meeting of creditors for the purposes of appointing a liquidator.

8. These steps do not require a licenced insolvency practitioner (“IP”) to carry them out, although it is common practice for an IP to be instructed as “advising member” to assist the directors in performing these duties. Guidance on the process and the role of the advising member is provided in the Statement of Insolvency Practice 8 (“SIP8”).
9. Section 388 of the Act provides that “a person acts as an insolvency practitioner in relation to a company by acting (a) as its liquidator, provisional liquidator, administrator or administrative receiver…”. Section 389 provides that acting as an IP without qualification is an offence and goes on to define the requirements for qualification, which includes being authorised by a Recognised Professional Body, such as ICAEW.

10. The two obligations of the IP raised in this matter are (the “Formalities”):
    1. The prospective liquidator must provide the chairman of the creditors’ meeting with his consent to act and a copy of his enabling bond and insolvency licence prior to the chairman issuing a certificate of appointment.
    2. The liquidator should file notice of his appointment with the Registrar of Companies and advertise it in the London Gazette within 14 days of his appointment.

The Heads of Complaint

First Head: A Ltd – S.98 Notices

11. On 13 July 2009, Mr Crook wrote to “all known creditors” enclosing a notice to A Ltd’s creditors of a meeting of creditors. It is stated that the purpose of the meeting was to receive a statement of affairs, a report on the company’s affairs, to nominate one or more insolvency practitioners as liquidator or joint liquidators and appoint a creditors’ committee. He did not refer or have regard to SIP8.

12. On 18 August 2009 Mr Crook again wrote to all the creditors advising them that at the meeting of creditors held on 12 August 2009 “…we were appointed and accepted the appointment as liquidators to the company.”

13. Mr Crook failed to comply with the Formalities, making it arguable that he was not actually appointed as liquidator, despite the fact he wrote to creditors advising them of his or his firm’s appointment.

14. In his letter to ICAEW dated 19 March 2012, Mr Crook acknowledged that he had not checked whether he needed to have an insolvency licence and said “I acted foolishly as I believed that I could act as I did and did not contact ICAEW to check with the technical department.” He reiterates this position in his final representations dated 5 June 2013. In his letter dated 2 August 2012 where he maintained that:
   (a) he acted honestly;
   (b) the position of creditors was not affected as there was no prospect of a dividend and they were kept informed;
   (c) there were no funds with which to appoint an insolvency practitioner; and
   (d) he too lost money as a creditor; and
   (e) he did not charge any fees for the work he did to close the company and had kept costs to a minimum.

Second Head: A Ltd – purporting to act as a liquidator

15. On 21 October 2009, Mr Crook reported to the creditors on the progress in realising the assets of the company and the availability of funds to make a distribution. The letter says “After the payment of fees and other costs associated with this liquidation, we can advise you that there will not be any funds available for distribution to either the preferential or unsecured creditors of A Ltd”. On 25 November 2009, Mr Crook wrote to creditors advising
that the company had been dissolved. In his final representations of 12 December 2012 he confirmed the identity of A Ltd’s creditors.

Third Head: B Ltd – S.98 Notices

16. On 12 October 2010 Mr Crook wrote to B Ltd’s creditors to convene a meeting of creditors pursuant to s.98 of the Act. The letter enclosed the notice of the meeting together with a proxy form and a guide to liquidator’s remuneration as per SIP8. On 25 November 2010 Mr Crook wrote to the creditors advising that he had been appointed as liquidator of the company. He had failed to comply with the Formalities.

17. In his letter to ICAEW dated 5 May 2012, he confirmed that there had been a succession of companies operating the car wash business which had been started with A Ltd, transferred to B Ltd and, following the cessation of trade at that company, transferred again to C. He maintained that the companies had suffered from a lack of turnover which had led to their insolvency.

Fourth Head: B Ltd – Purporting to act as liquidator

18. On 25 November 2010, Mr Crook wrote to B Ltd’s creditors stating that his firm had accepted the appointment as liquidators of the company. In his letter to PCD dated 18 June 2012, Mr Crook said that he called meetings of creditors in accordance with his clients’ instructions, but maintained that he acted in the best interests of all the creditors, as there were no assets to realise and he notified creditors of that fact.

19. Mr Crook accepts that he did not act in a professional manner but maintains that he acted honestly and kept all parties aware of what had happened and what was proposed for the dissolution of the company.

The Hearing

20. Mr Crook represented himself at the hearing. At the outset, the Chairman asked whether he admitted the complaint. He confirmed that he did. During the course of the hearing, it was necessary for the tribunal to adjourn on a few occasions to decide issues that had arisen.

Heads Two and Four – Acting as Liquidator

21. During the course of the hearing, it became clear to the tribunal that Mr Crook might not quite have understood to what he was actually admitting. Hence, the tribunal revisited the question with him, going through the complaint carefully to ascertain exactly to what he thought he was admitting. Mr Crook explained that at the time that he wrote to the creditors, he did not know that he was doing anything wrong. He said that he honestly thought that he could act as a liquidator. He has only come to realise at a later stage that he was not permitted to act as a liquidator.

22. Mr Jowett explained that this was a change in Mr Crook’s case. Mr Jowett had understood that Mr Crook admitted the complaint in its entirety. The tribunal noted that the Complaint was not that Mr Crook ought to have known that he was not permitted to act as a liquidator. The Complaint was that he did know at the time that what he was doing was wrong. The tribunal asked Mr Jowett what his evidence was that Mr Crook knew that he was acting inappropriately. Mr Jowett argued that it could be established as a matter of inference: it beggared belief that a chartered accountant would not know that he could not act as a liquidator without a licence. He argued that this raised questions as to Mr Crook’s credibility.
23. Mr Jowett made an application to amend the Complaint. The legal advisor advised that this should only be permitted where the amendment was minor or did not cause the defendant any prejudice. Mr Jowett argued that the Complaint was being amended in the defendant’s favour as it was a lesser charge. The tribunal refused the application, partly because it would not be right to grant such an application in the middle of the hearing, and partly because it could cause prejudice to the defendant. Mr Jowett later applied for an adjournment so as to deal with what he considered to be a change in Mr Crook’s case. The tribunal indicated that, given that Mr Crook had admitted part of complaints two and four, Mr Jowett might want to reconsider whether an adjournment was necessary. Mr Jowett, having taken the opportunity to consult, ultimately decided not to make an application to adjourn.

Heads One and Three – Section 98

24. The tribunal was concerned with the wording of these heads of complaint. It noted that there was no requirement under the Act to have a person qualified to act as an insolvency practitioner nominated as liquidator before notices were sent out. Hence heads 1(ii) and 3(ii) could not stand.

25. The tribunal noted that it was the company that would be liable under s.98 for failure to comply with the Formalities, not Mr Crook. Further, it noted that the IC had not sought to bring a complaint against Mr Crook for acting as a liquidator without a licence, when this was a far more serious offence than those relied upon by the IC.

26. After questioning Mr Jowett, it came out that the gist of heads one and three was that Mr Crook held himself out as having sufficient expertise to act as a liquidator and took responsibility in that regard. He had poorly advised his clients, Mr and Mrs D, as to the liquidation and in doing so brought discredit upon himself and ICAEW. The tribunal was concerned that this explanation did not sit comfortably with the wording of the complaint.

27. The tribunal asked Mr Crook a number of questions so as to ascertain whether he did indeed advise or help the directors. He eventually confirmed that he drafted the forms and stated that the directors struggled to write. This could be argued to be tantamount to advising the directors.

28. Ultimately, the tribunal decided that it could not find these two heads proven when it was not quite clear what exactly was being alleged against Mr Crook.

29. The tribunal found heads 2(b) and 4(b) proved. It asked Mr Jowett if Mr Crook had any previous disciplinary record. He confirmed that Mr Crook did not and made an application for costs.

Decision on Sentencing

30. The tribunal referred itself to the Guidance on Sentencing (August 2013). It considered that this complaint did not fall comfortably into any particular section. Ultimately, it decided that Mr Crook’s failings fell within Section 16 (“General Accountancy Failings”). He had mistakenly thought he could be appointed as liquidator and his actions on behalf of his clients amounted to bad advice in respect of his client’s affairs. Given that the mistake was innocent, no one’s interests had been harmed and he had immediately accepted he had erred when it was pointed out to him, it was prepared to limit its penalty to a reprimand and lesser fine than would ordinarily be case.
31. The tribunal considered the application for costs, taking into account Mr Crook’s means and decided to award £2,000 in costs. In giving its decision, it brought to Mr Crook’s attention the fact that, had the complaint been that he had been practising without a licence, the sanction could have been a fine greater than £10,000 as well as exclusion.

Sentencing Order

32. The tribunal ordered as follows:

(a) Mr Crook is given a reprimand.
(b) He is ordered to pay a fine of £1,000.
(c) He is ordered to pay the IC’s costs assessed at £2,000

Decision on publicity

Publication with name

Chairman Mr David Wilton FCA
Accountant Member Mr David Kaye FCA
Non Accountant Member Mr Richard Farrant
Legal Assessor Mr Jonathan Lewis 006180
Mr Akeel Mirza of 26 Lincoln Way, Enfield, EN1 1TE

A tribunal of the Disciplinary Committee made the decision recorded below having heard a formal complaint on 4 December 2013

Type of Member Provisional Member

Terms of complaint

The complaint is that Mr Akeel Mirza is liable to disciplinary action under Disciplinary Bye-law 4.1.a:

‘...in the course of carrying out professional work or otherwise he has committed any act or default likely to bring discredit on himself, the Institute or the profession of accountancy’

because:

1. Mr A Mirza acted dishonestly in that on or about 12 June 2012 he caused, permitted or failed to prevent the following false employment references being sent to A in connection with his employment by them:
   a. An employment reference dated 12 June 2012 from B
   b. An employment reference dated 13 June 2012 from C
   c. An employment reference dated 12 June 2012 from D

2. Mr A Mirza acted dishonestly in that on 8 November 2011 and 21 May 2012 he provided his employer A with a curriculum vitae indicating that he was the recipient of a BA in Accountancy from the University of J when he knew he had not obtained his degree from that University.

3. Mr A Mirza acted dishonestly in that on or about April and May 2012 whilst employed by B he accessed the firm’s payroll system when not authorised to do so.

4. Mr A Mirza acted dishonestly in that on or about April and May 2012 whilst employed by B he produced a payslip, for ‘A Mirza’ for January 2012, which he certified was a true copy of the original payslip by falsifying the signature of ‘E’ an employee in the same firm.

Hearing date 4 December 2013

Previous hearing date(s) None

Pre-hearing review or final hearing Final Hearing

Complaint found proved Yes

All heads of complaint proven Yes

Sentencing order Mr Mirza is unfit to become a member
Costs £4,700

Procedural matters and findings None
Parties present

Mr Jowett on behalf of the Investigation Committee ("IC")

Mr Mirza did not attend.

Hearing in public or private

The hearing was in public

Decision on service

In accordance with regulations 3-5 of the Disciplinary Regulations, the tribunal was satisfied to service

Documents considered by the tribunal

The tribunal considered the documents contained in the IC’s together with a table summarising Mr Mirza’s employment.

Service

1. The tribunal was satisfied as to service on the basis of the witness statement of Diane Waller, the Committee administrator, in which she confirmed that she sent a notice of the hearing to Mr Mirza at his registered address by first class post.

Factual Background

2. At the relevant time, Mr Mirza was a provisional member. He worked for:
   a. C from 31 July 2007 to October 2008;
   b. D from January 2009 to December 2010;
   c. B from 23 May 2011 to 23 May 2012; and

3. On 28 August 2012, B sent to ICAEW a copy of a letter dated 23 May 2012 which informed Mr Mirza that he had been dismissed from his employment following an investigation which concluded that:
   a. he had produced false payslips;
   b. he had falsified the signature of another member of staff for a mortgage application; and
   c. he used the firm’s equipment and software without their permission.

4. On 30 August 2012, C wrote to ICAEW expressing concerns that Mr Mirza had falsified an employment reference provided to A, purporting to have been sent by C, when this was incorrect.

5. On 12 September 2012, A wrote to ICAEW confirming that it had suspended Mr Mirza pending an investigation, but Mr Mirza decided to resign from his employment in the meantime.

6. A reviewed Mr Mirza’s employment and found that references received from B, C and D were false. It said that it could not verify information contained on Mr Mirza’s CV in relation to his degree.

7. On 2 January 2013, ICAEW wrote to Mr Mirza setting out the complaints which the case manager would be referring to the Investigation Committee. On 9 January 2013, Mr Mirza replied but did not make any representations which related to the complaints specifically. He stated that he was extremely disappointed that the case has been progressed to the committee;
b. stated that he is good at his job and does his work with the utmost integrity and ability at all times but understands that he has been extremely foolish and careless in relation to his personal information; and

c. provided his monthly expenses.

8. On 22 May 2013, the case manager wrote to Mr Mirza advising him of a change to the complaint wording. No further written representations have been received from Mr Mirza.

Head 1 – Providing false references to A

9. In their letter dated 12 September 2013 to ICAEW, A explained that the firm had received references from D, B and C. All three firms responded to A’s enquiries about these references by informing it that the references were forged. It also transpired that Mr Mirza had set up domain names and used the names to send the CV’s to A. On further investigation, it was clear that these domain names are linked to Mr Mirza.

10. In response to these allegations Mr Mirza stated the following in correspondence:

a. He was employed by D (between January and December 2009) and F (between January and December 2010).

b. He received emails from a company called “H”. He ignored them initially, not knowing what they were. When he found out what they were, he immediately lodged a complaint saying that he had not set up the accounts and asked that the company close them.

c. His friend, Mr G confessed to sending the employment references. He said that Mr G suffers from a severe bipolar disorder and is “forgetful and childish”.

d. He allowed his friend to use his Hotmail account to register for online games.

e. Mr G said that he had answered some of Mr Mirza’s personal emails in jest and that his friend would be happy to verify his account in a telephone conversation.

f. He keeps details of his employment in his archived email ‘Inbox’ so that he can access them from his mobile phone and assumed that this is where Mr G gained the information for the references.

g. He did not know of the false references until ICAEW had brought the matter to his attention. He assumed that the employment agencies had obtained the references and not A.

11. ICAEW contacted Mr G on 17 October 2012 by phone and by email on 17 and 22 October 2012. Mr G provided the following information:

a. He had been close friends with Mr Mirza for two years.

b. Mr Mirza gave him the username and password to Mr Mirza’s Hotmail account so that he could play games online.

c. He used this to falsify the references.

d. The false references were intended as a joke.

e. He created the fake emails using the names of companies which Mr Mirza had previously worked for.
Head 2 – Provided false information in his CV

12. In its letter dated 12 September 2012, A stated that it had reviewed Mr Mirza’s CV and could not confirm the University from which he had graduated. The copies it had showed that Mr Mirza attained a BA Accountancy degree apparently from the University of J. A confirmed with the University of J that Mr Mirza had not attended there.

13. On 1 October 2012, the case manager wrote to Mr Mirza asking him to comment on the accuracy of his CV. He replied on 2 October 2012, claiming that the CV should have shown that he attained the degree at the University of K. He understood that the University changed its name to I University.

Complaint 3 – Mr Mirza gained unauthorised access to the firm’s payroll system

14. B informed ICAEW that the firm had dismissed Mr Mirza on 23 May 2012 because he had gained unauthorised access to the firm’s payroll system. He had done so through the computer of another employee, who was absent from work and he had produced copies of his payslips. At a disciplinary hearing on 16 May 2012, the firm decided to dismiss Mr Mirza for gross misconduct. B have confirmed that Mr Mirza obtained copies of the payslips and forwarded them to financial advisers in approximately April-May 2012

15. On 20 March 2012, Mr Mirza wrote to ICAEW stating that he disagreed with the minutes of the meeting as he did not sign the payslip.

Head 4 – Falsifying a member of staff’s signature

16. B alleges that Mr Mirza falsified the signature of a member of their staff on one of the payslips. A copy of Mr Mirza’s payslip for January 2012 shows a stamp certifying that it is a true copy of the original document and the signature of E dated 30 April 2013. Mr E is an employee of B. Mr E claims that he did not sign the payslip and was unaware that his name was used.

17. Mr Mirza claims that:
   a. he used E’s name as E was the first person he thought of. He had mentioned this to E earlier who thought it was a joke.
   b. E was not in the office when the payslips were signed.
   c. He understood that anyone could certify payslips, including friends.

18. In his letter of 7 October 2012, Mr Mirza claimed that his friend Mr G was responsible for the signature on the payslip. In his email dated 17 October 2012, Mr G said that he had gained access to Mr Mirza’s email account and saw Mr E’s name in the Junk email folder. He said that he used the name to sign the payslip. He did this as a practical joke.

Conclusions and Sentencing

19. The tribunal considered that Mr Mirza’s explanations or excuses for each of the matters complained of were simply not credible. It considered that a “forgetful and childish” friend would not be able to put together such complicated practical jokes. It is unlikely that Mr Mirza would give access to important information, such as passwords, to a friend who was irresponsible.
20. It noted that I University is generally considered to be a less prestigious university than the University of J and there would be an obvious motive therefore, for Mr Mirza to lie about where he graduated. Whilst Mr Mirza claims this was an innocent error, this is not credible.

21. The tribunal noted that under Disciplinary Bye Law 22.7(a) it had the power to declare a provisional member to be unfit to become a member. It considered that given Mr Mirza’s dishonest conduct and the number of incidents involved, this sanction was merited.

Sentencing Order

22. The tribunal ordered:
   (1) It is declared that Mr Mirza is unfit to become a member.
   (2) Mr Mirza must pay the IC’s costs of £4,700

Decision on publicity

Publication with name

Chairman Mr David Wilton FCA
Accountant Member Mr David Kaye FCA
Non Accountant Member Mr Richard Farrant
Legal Assessor Mr Jonathan Lewis 008749
APPEAL COMMITTEE PANEL ORDERS

8 Mr Nicholas Albert Hill [ACA] 4 Deerswood Road, West Green, Crawley, West Sussex, RH11 7JN

A panel of the Appeal Committee made the decision recorded below having heard an appeal on 4 November 2010 and 5 January 2011

Type of Member: Member

Date of meeting of the Disciplinary Committee tribunal (DCt):
10, 11 November 2009,
17, 18 December 2009 and
27 January 2010

The Investigation Committee had preferred the following formal complaint to a Disciplinary Committee tribunal:

That the defendant
Is liable to disciplinary action under Disciplinary Bye-law 4(1)(a), namely he has:

‘...in the course of carrying out professional work or otherwise he has committed any act or default likely to bring discredit on himself, ICAEW or the profession of accountancy’.

In that
1 Between 30 June 1999 and 31 August 2006 Nicholas Hill FCA as Finance Director of company A Ltd in breach of his fiduciary duty to his employer company A entered into the following improper transactions either personally or through his own company without appropriate authority;

i. he signed a cheque for £20,000 dated 26 June 2002 in respect of trustee fees drawn on the account of the company B Ltd Pension Scheme payable to company F Ltd, a company in which he held a beneficial interest

ii. he signed a cheque dated 14 November 2001 for £25,000 in respect of trustee fees drawn on the account of the company B Ltd Pension Scheme payable to company F Ltd, a company in which he held a beneficial interest

iii. he signed a cheque for £30,000 dated 2 November 2004 drawn on the account of company C payable to company D Ltd, a company in which he held a beneficial interest

iv. he signed a cheque for £30,000 dated 2 November 2004 drawn on the account of company C payable to company D Ltd, a company in which he held a beneficial interest

v. he acquired the freehold of G, the premises occupied by his employer through company F Ltd a company in which he held a beneficial interest for £55,000 and subsequently disposed of it to a third party for £200,000

vi. He acquired the freehold interest in H through company D Ltd (formerly company F Ltd) a company in which he held a beneficial interest and rented it to his employer
vii. He acquired furniture from G written off by his employer through company D Ltd (formerly company F Ltd) a company in which he held a beneficial interest and leased it to his employers company A Ltd.

2 Between 30 June 1999 and 31 August 2006 Nicholas Hill FCA as Finance Director of company A Ltd failed to disclose the following transactions to company I, the auditor of both company A Ltd and its pension scheme, or ensure they were appropriately disclosed in the accounts.

i. he signed a cheque for £20,000 dated 26 June 2002 drawn on the account of the company B Ltd Pension Scheme payable to company F Ltd, a company in which he held a beneficial interest for trustees fees

ii. he signed a cheque dated 14 November 2001 for £25,000 drawn on the account of the company B Ltd Pension Scheme payable to company F Ltd, a company in which he held a beneficial interest for trustees fees

iii. he signed a cheque for £30,000 dated 2 November 2004 drawn on the account of company C payable to company D Ltd, a company in which he held a beneficial interest

iv. he signed a cheque for £30,000 dated 2 November 2004 drawn on the account of company C payable to company D Ltd, a company in which he held a beneficial interest

v. he acquired the freehold of G, the premises occupied by his employer through company F Ltd a company in which he held a beneficial interest for £55,000 and subsequently disposed of it to a third party for £200,000

vi. he acquired the freehold interest in H through company D Ltd (formerly company F Ltd) a company in which he held a beneficial interest and rented it to his employer

vii. he acquired furniture from G written off by his employer through company D Ltd (formerly company F Ltd) a company in which he held a beneficial interest and leased it to his employers company A Ltd.

Decision of the Disciplinary Committee tribunal

The Disciplinary Committee tribunal (DCt) found the complaint proved and ordered that he be excluded from membership, fined £25,000, and ordered to pay costs of £32,000. It is not within the tribunal's power to decide whether or not the defendant will ever be readmitted to membership of ICAEW. It recommends that no application for readmission be entertained for a period of seven years.

Decision of the Appeal Committee panel

The panel dismissed the appeal in relation to the order of exclusion. In relation to the appeal against the fine and costs, the panel decided that the DCt fine of £25,000 was appropriate. The panel reduced the costs of the disciplinary hearing from £32,000 to £24,000. The panel awarded costs of £9,846 in relation to the appeal.
Reasons for the decision

1. On 28 April 2009, the Investigation Committee (the IC) of ICAEW preferred a disciplinary complaint against Mr Nicholas Albert Hill ACA, a member of ICAEW. It alleges that he is liable to disciplinary action under Disciplinary Bye-law 4.1.a in that:

   ‘...in the course of carrying out professional work or otherwise he has committed any act or default likely to bring discredit on himself, ICAEW or the profession of accountancy’.

2. The particulars are divided into two charges. Charge 1, which contains 7 specific allegations, alleges that Mr Hill between 30 June 1999 and 31 August 2006, as Finance Director of company A Ltd, in breach of his fiduciary duty to his employers, entered into a series of improper transactions either personally or through his own company without appropriate authority. Charge 2 alleges that, in relation to the subject matter of the same 7 allegations, he failed to disclose the transactions to company I the auditor of company A Ltd and its pension scheme, or ensure that they were appropriately disclosed in the accounts.

3. The specific allegations which it is alleged Mr Hill improperly entered into and failed to disclose to company I were that:

   (i) He signed a cheque for £20,000 dated 26 June 2002 in respect of trustee fees drawn on the account of company B Ltd Pension Scheme payable to company F Ltd, a company in which he held a beneficial interest.

   (ii) He signed a cheque for £25,000 dated 14 November 2001 in respect of trustee fees drawn on the account of company B Ltd Pension Scheme payable to company F Ltd, a company in which he held a beneficial interest.

   (iii) He signed a cheque for £30,000 dated 2 November 2004 drawn on the account of company C payable to company D Ltd, a company in which he held a beneficial interest.

   (iv) He signed a cheque for £30,000 dated 2 November 2004 on the account of company C payable to company D Ltd, a company in which he held a beneficial interest.

   (v) He acquired the freehold of G, the premises occupied by his employer, through company F Ltd a company in which he held a beneficial interest for £55,000 and subsequently disposed of it to a third party for £200,000.

   (vi) He acquired the freehold interest in H through company D Ltd, a company in which he held a beneficial interest and rented it to his employer.

   (vii) He acquired furniture from G written off by his employer through company D Ltd, a company in which he held a beneficial interest, and leased it to his employers company A Ltd.

4. Mr Hill appeals against the decision of a DCt given on 8 April 2010 and confirmed by a record of decision dated 25 May 2010, finding the 14 allegations proved and ordering Mr Hill to be excluded from membership, pay a fine of £25,000 and pay costs of £32,000. By his Notice of Appeal, Mr Hill seeks an order rescinding the tribunal's order as to exclusion, fine and costs and the making of such order as a panel of the Appeal Committee may think appropriate pursuant to Disciplinary Bye-law 29.2.
5. The principal issues raised by this appeal are whether the tribunal and the pre-hearing review tribunal erred in allowing the IC to adduce in evidence a large volume of litigation documents and other material that went beyond the allegations contained in the formal complaint; whether it was permissible for a tribunal member on the Disciplinary Committee, having missed part of one sitting, to adjudicate at a subsequent sitting and take part in the decision of the committee; and whether the legal assessor properly performed his functions.

6. Mr Hill contends that the decision of the tribunal, and the decision of the pre-hearing review tribunal, to adduce in evidence a large number of documents relied on by the IC were wrong because the documents contained irrelevant and prejudicial material; that Disciplinary Byelaw 19 does not permit a member of a tribunal who in the course of a hearing is unable to continue to attend, and the remaining members continue with the hearing, to rejoin the tribunal and adjudicate at a subsequent sitting when the member has missed hearing oral evidence, and that what occurred in this case was a fatal flaw; and that the legal assessor had a duty to intervene and advise the tribunal on both these matters.

Background

7. Mr Hill has accepted for the purposes of this appeal the background set out in the DCt’s record of decision. These state:

‘7. Before the events complained of, the defendant was employed as a chartered accountant in a well-known firm of accountants for about ten years. He became a Senior Manager there.

8. The defendant left that firm and joined an audit client of his previous employer; he became the Company Secretary from 3 December 1993 until 31 August 2006, and the Finance Director from 1 April 1995 until 31 August 2006, of a company called company B Ltd. That company changed its name to company A Ltd on 29 December 2003. At all material times, company A Ltd was a wholly owned subsidiary of a German company and its ultimate parent company was a Japanese company, quoted on the Tokyo stock exchange.

9. Company A Ltd’s registered office was G until 30 July 2003, when it became H. It occupied G as a lessee.

10. The defendant was also a trustee of the company B Ltd Pension Scheme (‘the Pension Scheme’) from 16 April 2000 to 26 September 2006. This was the company pension scheme of company A Ltd.

11. By the end of April 2000, and at all material times thereafter, the defendant and another individual (‘the co-director’) were the only two directors of company A Ltd and the only two trustees of the Pension Scheme. The defendant was also an employee of company A Ltd. The defendant owed fiduciary duties to his employer while he was a director of company A Ltd.

12. On 30 June 1999, while company A Ltd was still called company B Ltd, the defendant caused to be incorporated a company called company F Ltd. That company was not, in any way, part of company A Ltd group of companies; it was a private company set up by the defendant and the co-director.

13. From 30 June 1999 to 17 March 2003, the defendant was one of company F Ltd’s two directors and also its company secretary. The other director was the co-director of company A Ltd. They were also the beneficial owners of company F Ltd’s shares. On 6 September 2002, the defendant arranged for
company F Ltd to change its name to company E Ltd and on 12 December 2002, it was changed once more to company D Ltd.

8. Mr Kenneth Hamer, who represented Mr Hill before us, informed us that for clarification he would like to add ‘former’ before ‘audit client’ in paragraph 8 and that in paragraph 12 the incorporation of company F Ltd was with the knowledge of company A Ltd.

9. The complaint dated 28 April 2009 and the IC’s summary of the allegations dated 5 May 2009 are set out as the first documents in the core bundle before the tribunal as is usual. They were sent out to Mr Hill. Before then, on 11 March 2009, Mr Hill had written to the IC at its invitation to make representations as to the allegations set out in correspondence. There had been other letters and emails from Mr Hill and this was his opportunity to state matters which could affect the decision of the IC as to whether it should issue a formal complaint. Mr Hamer has contended that this letter in effect contains Mr Hill’s ultimate defence which will be considered later. To understand the defence raised, we have considered Mr Hill’s witness statement dated 1 November 2009, his defence dated 25 November 2009, a Skeleton Argument dated 14 December 2009 and written final defence submissions dated 27 January 2010 (as well as his submissions in this appeal).

10. As to the substance of the allegations, Mr Hill said that at the time the transactions took place, he did not believe that he had acted in breach of the guide to professional ethics for integrity and professional behaviour, and that there was no intent to breach any fiduciary duty to company A Ltd; nor was there any intent to discredit the profession, if that had occurred.

11. Mr Hill contends that each of the transactions mentioned above was bona fide and approved and authorised by the managing director of company A Ltd at the relevant date. The costs that were incurred by company A Ltd were either in line with, or were significantly less than, the amounts included within the company’s financial budget that was approved annually by the parent company. Company A Ltd also benefitted by obtaining tax relief on costs incurred on payments to entities connected with him. Mr Hill maintains that throughout he acted with the authority and under the instruction of the managing director of company A Ltd, and that every commercial undertaking that he was involved in was for the ultimate benefit of both company A Ltd and the group.

12. This panel of the Appeal Committee was sent the appeal bundles in advance of the hearing, together with additional documents which Mr Hill was given permission to adduce. Albeit that Mr Hamer helpfully identified in his skeleton argument those documents he asked us to pre-read, the panel has in fact read into all the documentation before us widely.

13. The panel is conscious of the limited ambit of the appeal as presented. It was not submitted to us that Mr Hill never undertook the relevant transactions referred to in the complaints. Moreover, Mr Hill accepted that he had not disclosed them to the auditors or in the accounts. We have nevertheless considered not only the findings of the tribunal but the underlying documentation and the transcripts for a number of reasons:

(i) Our mandate and powers under Disciplinary Bye-law 29 provides:

“Powers of Panel on appeal

29.1 On an appeal Bye-law 26.1 against an order made on a formal complaint, the Panel appointed to hear the appeal –

(a) shall take into consideration the record of the evidence given before, and the documents produced to, the tribunal at the hearing of the complaint;
(b) may, if it thinks fit, re-hear any witness who gave oral evidence before the tribunal; and
(c) may on special grounds (as to which the panel shall be the sole judge) receive fresh evidence.

29.2 On such an appeal, the panel may by order –
(a) affirm, vary or rescind any order of the tribunal;
(b) substitute for any such order or orders such other order or orders as it thinks appropriate, being in every case an order which the tribunal might have made on the formal complaint;
(c) ..... 
(d) direct that the complaint shall be re-heard by a new tribunal appointed under Bye-law 19.1.

(ii) Our over-arching duty is to ensure that a member shall have had a fair hearing. In relation to the documents as to which exception is taken we felt it important to be able to form a judgment not only as to their content and actual or potential relevance but also as to how the tribunal regarded them in the course of the hearing. Paragraph 5 of the Notice of Appeal asserts that the tribunal was improperly influenced by them.

(iii) As to the temporary absence of one member of the tribunal, we considered it necessary not only to be able to make a judgment as to the issue of consent but as to whether the evidence given during the absence and reviewed on transcript by that member was such as to give rise to concern as to the overall fairness of the proceedings because of the absence.

(iv) To assist us in arriving at an informed judgment so as to determine, after our findings as to the law, the most appropriate order, Mr Hamer urged us to rescind the tribunal’s order but not to remit the matter for rehearing were we to allow the appeal. We also have the power to rescind an order of the tribunal and to substitute such other order or orders as we think appropriate.

14. As stated, on 11 March 2009, Mr Hill represented that because company A Ltd had written to ICAEW stating that it had no complaint against him, no formal complaint could be issued. Mr Fin O’Fathaigh, who was in charge of the investigation and who has acted in this matter throughout for the IC, had in our view a duty to investigate the assertion given that complaints had also been made by other parties, including company I as the auditors. By the time the summary of the complaint of 5 May was issued, Mr O’Fathaigh had obtained copies of the Particulars of Claim, supporting affidavit of Mr J the Finance Director of company A Ltd, ex parte injunction and settlement agreement (‘the Agreement’) relating to an action brought in November 2007 against Mr Hill and others by company A Ltd.

15. The Particulars of Claim include allegations which arise from the same subject matter as is relied upon by the IC in supporting its case of breach of fiduciary duty. There are express allegations of fraudulent conduct in the pleadings and in the supporting affidavit of Mr J. Subsequently the Agreement (undated on its face but signed by a number of parties including Mr Hill and Mr J) settled this litigation. The Agreement contained a confidentiality clause at paragraph 15 which states:

‘The company A Ltd parties and Other Parties agree that they shall keep the terms of this settlement agreement confidential and shall not disclose its terms to any third party other than their professional advisers or bankers (save to the extent required by law or as is necessary to perform or enforce this settlement agreement).’
16. Paragraph 1 of the Agreement provides that the Agreement is in full and final settlement of the litigation as well as settling all other claims ‘present past or future and whether known or unknown’. Paragraph 16 provides that no other public statements shall be made about the settlement except for one outlined in that paragraph. Mr J was also a signatory to the Agreement.

17. Mr O’Fathaigh sought these documents from Mr Hill and they were referred to in this summary of complaint dated 5 May 2009 and included in the accompanying bundle, ‘to assist the tribunal in understanding the dispute’. The tenor of the Agreement which in part required the payment of large sums by Mr Hill was also referred to. Mr O’Fathaigh stated that the most significant issues raised in the litigation were addressed in the complaint.

18. On 15 July 2009, the chairman of the DCt made directions by consent which included a direction that Mr Hill should serve a fully particularised defence by 25 September 2009, that the parties should serve additional evidence by 23 October and that the hearing was fixed for 10 November with a 2 day time estimate.

The Interlocutory Hearing on 20 October 2009

19. On 14 September 2009, Mr Hill made an application for a stay because of the terms of the Agreement and its alleged effect on the conduct of the proceedings, alternatively that the hearing be in private, that Mr J be precluded from giving evidence or producing documentation and that in prosecuting the claim the IC be precluded from producing or relying on the Particulars of Claim, the unsworn affidavit of Mr J, the Injunction and a letter from company I reporting potential misconduct. Objection was also taken to Mr J’s witness statement which followed in the main the consent of the affidavit. The hearing of this application was on 20 October 2009. Mr Hill was represented by Mr Gallagher of Counsel. The tribunal found as follows in its written decision:

‘…..

Mr J’s Statement

22. The tribunal cannot responsibly hold that the statement of Mr J should be excluded because it was not shown a copy of it, has not read it, and was not asked to rule specifically on any part of it. It was characterised by the defendant’s counsel as very long and detailed and (setting aside for the sake of argument the Agreement Point) there is little time left for the defendant to prepare a response to it. These are inadequate grounds to exclude the evidence of a key witness. Presumably, Mr J’s evidence speaks to the facts and matters which are the subject matter of the complaint; if that is the case, his evidence is obviously relevant, even if it may also contain matters of less relevance or even irrelevance. The defendant is represented by experienced solicitors and Counsel who are well able to consider a statement of some length. What weight the tribunal will give to the evidence and whether it proves the case against the defendant is a matter entirely for the tribunal at the hearing, and that tribunal can be trusted to make such judgments.

The Litigation Documents – relevance

23. In so far as the statement is objectionable because it refers to the litigation which is the subject of the Agreement; that needs to be considered with the litigation documents.

24. Prima facie, it is difficult to see the obvious relevance to the complaint of the litigation documents per se. Put very simply, this case is not about the litigation, findings of a Court settled litigation; it is about (i) specific allegations of breaches of fiduciary duty and (ii) specific allegations of failure to disclose transactions to company auditors. Those alleged events took place before the litigation ever commenced. That said, it cannot easily be said that these documents must be obviously relevant in the case which the IC wishes to
advance in the way they wish to advance it. The documents may, for example, corroborate in some way the so far unseen evidence of Mr J. Conceivably, then they might be relevant; how much weight should be given to them is another matter. The tribunal does not give any indication about its options of this evidence as it relates to the merits. Applying clause 28 and exercising its discretion, it holds that the documents should be allowed to remain for the reasons given.

Repetitive and Oppressive Documents
25. The defendant complains that Mr J’s statement, the particulars of claim and Mr J’s affidavit which supports the application for an injunction are prolix, confusing, unwieldy, repetitive and, because they are repetitive, oppressive.

26. The tribunal has some sympathy with the assertion that these documents are repetitive, and with the confusion as to why, and how, all of them are necessary and what parts of which documents are intended to be relied upon and why. However, these are not reasons to exclude evidence from a tribunal in a serious matter. The tribunal considers that the defendant has put his case too high on this issue. The documents complained of are not so repetitive and voluminous as to present the defendant and his legal team with overwhelming and oppressive amounts of work between the date they were sent and the hearing date. The concern about the prolix and precise use to which the documents will be put, at this stage, is a matter for case management. The tribunal rejects the submission that by allowing the documents to remain in the bundle for the tribunal at the hearing to read them, it would be to permit the ultimate tribunal’s minds to be prejudiced. The tribunal of this profession is both experienced and expert: it is capable of ascertaining what is relevant and what is merely repetitive.

Company I’s Letter
27. This letter reports the writer’s belief that the defendant may be liable to disciplinary action and indicating that he is available to supply any further information. He did this as representative of the auditors of the defendant’s company which is cited in the complaint. It is obviously relevant and may be of some probative value. It should not be excluded.

20. However, by the time of hearing above on 20 October 2009, Mr Hill had not produced his fully particularised defence (it was due by 25 September) nor was it produced until 27 November, between days 2 and 3 of the substantive hearing. This is an important lapse in our view. Mr Hamer tells us that the letter of 11 March in effect provides details of the Defence, but that we find unacceptable. The complaint and summary of the complaint were not served until after that date. Crucially, the letter does not mention the Agreement or the litigation documents, whereas the defence includes:

‘Nevertheless, the basis of this complaint is not understood, taking into account the following:
The withdrawal of the complaint on 28th March 2008 and
The terms of settlement wherein the parties (including company A Ltd) agreed that this was a:

...settlement of all claims of any nature whatsoever whether present, past or future and whether known or unknown and whether relating to fraud, breach of trust or fiduciary or other duties or contracts, negligence or otherwise howsoever, including all of the matters raised in the particulars of claim...’

21. It has always been central to Mr Hill’s defence of the breach of fiduciary complaint that, pursuant to an agreement in a civil action, company A Ltd has no complaint against him and that this was confirmed in writing to the IC; that being so there was no basis upon which
ICAEW could issue a complaint against him for these matters. That further, by reason of the agreement, Mr J (who became Finance Director of company A Ltd and was the IC’s main witness) was precluded from giving evidence against him, and the effect of the agreement was to ratify any breach of fiduciary duty (which breach was denied). The defence as directed was to be fully particularised, but in fact the alleged defence of the Agreement appears to have been expanded upon in the course of the hearing.

22. The Particulars of Claim and Agreement were also specifically referred to in Mr Hill’s own witness statement.

23. Further, the Skeleton Argument submitted on behalf of Mr Hill makes an attack on the reliability of Mr J’s evidence in the following terms:

3. It is submitted that the IC should not rely on the evidence of Mr J because:

   a. He is bound by the settlement agreement of January 2008, which he signed.

   b. He is in breach of the settlement agreement by making witness statements to the DCT.

   c. He has no personal knowledge of the facts having been appointed as finance director four months after the defendant’s departure.

   d. His personal interpretation of past events is of no relevance, and is clearly prejudicial.

   e. He has raised fresh issues (some highly prejudicial to the defendant) which have no relevance to these complaints. In doing so, Mr J is also in breach of the terms of the settlement agreement.

   f. He has withheld material information and documentation from the IC and in addition, restricted the material available to company K who had been engaged by company A Ltd and which may have had relevance to these complaints.

   g. He is attempting to use the IC to circumvent the terms of the legally binding settlement agreement because of his desire to ensure that the defendant is excluded from membership, as is clearly evident in the comments contained in his emails and written statements.”

As to e., we believe this to be a reference to his affidavit and witness statement. As to g., this includes reference to the documents relied upon by Mr Hamer.

24. At the close of the IC’s case, Mr Cope made a submission (without notice) of no case to answer he said:

‘We also have a situation where the settlement agreement effectively ratified everything that is effectively set out in the particulars of claim namely the alleged breaches of fiduciary duty, and the parties when they came to sign this agreement obviously were represented by solicitors and had the benefit of legal advice.’

25. The notion that the Agreement had ‘ratified’ the ‘alleged breaches of fiduciary duty’ set out in the Particulars of Claim was we believe new but another example of the relevance of the litigation documents to Mr Hill’s defence. For clarification, we record that all of Mr Hill’s
arguments based on the alleged effects of the Agreement as to the litigation issues failed. They were made without any citation of authority which was left to Mr O’Fathaigh to provide. As held, they were devoid of any merit and even after the tribunal had so held after Mr Cope’s submission of no case to answer, Mr Hill made reference to ‘ratification’ in his answer in cross-examination on breach of fiduciary duty and the Final Submissions likewise continued to maintain the points. That however is not directly in point, but the reliance by Mr Hill himself on the litigation and other documents said by Mr Hamer to be irrelevant, oppressive and prejudicial is highly relevant to this appeal.

26. Further, the submissions make reference to the payments made by Mr Hill and Mr L:

g. The financial settlement more than compensated company A Ltd for any loss that may have occurred as a result of any potential breach of duty. Company A Ltd received a freehold property valued at £800,000 (free of mortgage and liens) plus £500,000 as a cash payment.

h. The financial claims made by company A Ltd for the matters in this complaint amount to a maximum claim of £206,200 (or £230,521 if you include all the furniture rentals). This amount comprises: £20,000 to the pension scheme for claim 1; £25,000 to the pension scheme for claim...

27. It was part of Mr Hamer’s argument that one area of prejudice was Mr O’Fathaigh’s submission that the litigation documents could be used as the basis of cross-examination as to why substantial payment had been made in respect of allegations which included the subject matter of the complaints. In fact no such cross-examination took place at the substantive hearing but the payments were prayed in aid by Mr Hill himself as showing that company A Ltd had indeed been compensated. Indeed, this was later held to be a mitigating circumstance by the tribunal.

28. Thus, due to the absence of the defence, the tribunal was invited to deal with the application without knowledge of Mr Hill’s case and the possible significance of the documents in question to his case and the rebuttal of it whether by background to the Agreement or otherwise. Further, Mr O’Fathaigh was and remained unable to form an informed view to enable the redaction or editing of documents.

29. The panel was informed that it was Counsel who advised that the defence should not be served before the application was determined (in breach of the direction). The order had been by consent and no application was made as to further time. However the situation came about, and adverse inferences could be drawn, it was highly regrettable that the application in relation to documents was made in the absence of the tribunal knowing that the litigation and its settlement by the Agreement formed a pivotal part of Mr Hill’s case. The Agreement without detailed reference to the Particulars of Claim would have been a sterile document.

30. As to the Particulars of Claim, the affidavit and witness statement, Mr Gallagher’s central complaint was that it was the repetition in documents placed early in the bundle produced that gave rise to prejudice rather than that the tribunal could not put irrelevant or pejorative parts aside when judging the case. This is voiced in the decision; the tribunal considered it as a matter for case management and encouraged the parties to render and edit the documentation. Without the defence, we can understand why Mr O’Fathaigh was reluctant to embark on this course. He told us during submissions of his wariness as to what he might face in what were complicated proceedings and this is reflected in his correspondence with Mr Cope.
The Hearing on 11 November 2009

31. Eight days before the hearing, Mr Hill’s witness statement was provided, although further evidence had been directed to be served by 23 October. Albeit not the defence, this document informed Mr O’Fathaigh by inference of the ambit of the defence. Mr O’Fathaigh informed us that he was much engaged in that week on another matter and in obtaining a number of witness statements, the necessity of which emerged with the content of Mr Hill’s statement.

32. On the first day of the substantive hearing, Mr Chris Cope, solicitor, who represented Mr Hill made an application relating to the Agreement and the documents in question. Mr Cope applied for the hearing to be held in private by reason of the requirements of the Agreement that Mr Hill make no public statements and to guard against press reporting of “defamatory” material. He further sought that the tribunal considered the exhortation made on 20 October that the IC clarify before the hearing why the litigation documents are relevant and what parts of each are to be relied upon.

33. Mr Cope made complaint about the first 150 documents in the bundle being prejudicial and stated that a summary of the issues could have been prepared.

34. After argument and Mr O’Fathaigh’s statement that he would keep Mr J’ evidence in chief tightly to the complaint: the transcript records intervention by the Legal Assessor:

‘LEGAL ASSESSOR:
The next thing to happen and it deals with the objectionable material and the two seem to be different because the argument runs that a lot of this documentation and statements by Mr J in particular, on the 20th and coming back again, could it not be said that what we can do in fact is for the parties to narrow down what is relevant now, whittle down into Mr L’s evidence and the Hill evidence what is germane and that would provide an answer to the problem and what is evocative or defamatory falls away. Would you accept that as a possible conclusion?

MR COPE:
Yes, there are two elements to this: One is the emotive language from Mr J and Mr N and we can deal with that on the basis of it being no use being put to Mr N in a public forum...

MR O’FATHAIGH:
You mean Mr J?

MR COPE:
Yes, there are too many ‘Hs’ in this case. So far as the other matter is concerned it seems to me we have moved on. The initial disciplinary papers comprised some general correspondence and papers. Now we have the IC relying on a witness statement and I am sure that is the basis on which Mr O’Fathaigh wishes to put his case, to rely on the witness statements. So, the other part is wholly academic and not relied upon by anyone at all.

LEGAL ASSESSOR:
I am trying to understand how this problem escalated beyond that it was because there was no defence in September and ICAEW carried on. A week before the trial your client served this huge pile of documents dealing with the use of evidence. That in turn produced evidence in the bundle and then it balloons out of proportion and to deflate the balloon you have to cut out, if I may say so, ruthlessly what is not relevant, not referring to it at all. I can understand why it has happened but it is an unhappy chance. Now we have the opportunity, everyone in this room, to go back and to save a considerable amount of time. We could also perhaps avoid two more days but it involves a significant amount of time for
the parties cutting away what is truly irrelevant. Mr J repeatedly asserts that in his opinion Mr Hill has been fraudulent. It is repeatedly stated in emails and in his statement.

As I understand it and the tribunal understands it, fraud played no part. He is accused of being fraudulent in this complaint. In the circumstances and I must stress I say this with the permission of the tribunal, they feel that the allegations of fraud by Mr L against Mr Hill have no relevance to this hearing for the simple reason that is not the complaint against him. If the tribunal is right or it is accepted by the parties, one way forward is to remove the allegations against Mr Hill and perhaps that will take a great deal of the heat out of this case.

MR COPE:
There would be a number of questions I would be putting to Mr J this afternoon and it extends beyond four because are four issues: Fraud, falsification, there is misappropriation and misrepresentation, all very serious allegations not borne out in the complaint. If we can take those out of the complaint we can reduce the length of the proceedings.

MR O'FATHAIGH:
I have spoken at length with Mr J on this, that I would be focussing tightly on the complaint. He is not to express opinion or enter any other territory so he knows all I am interested in is the complaint before you today. What Mr Cope intends to draw out in cross-examination of the matter, if I stray past what I intend to do which is focus on the complaint, you are free to stop me at any point but my intention is to get on with the hearing only with the issues before the hearing and which the Legal Assessor put before him.

LEGAL ASSESSOR:
I think that is very helpful. I would imagine that may well be the IC’s intention and will be carried out but they can’t vouch for what Mr J is going to say in the box. Furthermore, that is going to predicate what he is going to say in cross-examination. So, I am wondering whether the most helpful way forward is what everybody, now these issues are out and the evidence is out, to look at the matters. I am sure that is the way forward. I can understand how that has developed but that is in the past now and we move forward in a proportionate way.

MR O'FATHAIGH:
I am not sure if you are suggesting we adjourn to a future date to have the evidence. I have a man whose evidence is available at 2 o’clock today. I think what you are suggesting is that we sit down and go through the evidence. I think quite right there are two witness statements, one from Mr Hill and another witness statement. I don’t think that is something we can do in a hurry or quick fashion. You either adjourn the case of your own motion to a different date and order Mr Hill to serve the defence fully particularised and then the IC will focus itself on the points at issue or we get on with the hearing and you manage the evidence on foot. I understand what you say, you can’t know what Mr J would say but you can’t know what everyone will say; but I will talk to Mr J very carefully and say the tribunal only want actual answers to their questions and nothing more. The tribunal can ignore what they consider irrelevant and consider what is relevant. 

35. The tribunal made an order that the cross-examination of Mr J be in private so as to give Mr Cope a free hand in his questioning and to guard against him speaking of matters beyond the complaint. The chairman later recorded this course as being a compromise agreed to by the parties after the exchanges.

36. Thus although it would have been much more satisfactory had the direction as to the defence been complied with (and no good explanation has been tendered as to why it was not), for then Mr O’Fathaigh and Mr Cope could have undertaken the task of simplifying the
documentation before the hearing, in the end by discussion as to case management a way forward was achieved without an adjournment. What emerged characterised the conduct of the whole hearing as revealed by an examination of the transcripts:

(i) As propounded by the Legal Assessor, the tribunal had most clearly in mind that only the issues and evidence relevant to the complaint were to be the subject of oral evidence and their consideration.

(ii) Against the background of Mr J’s witness statement, the need to consider in any detail the litigation documents fell away. Indeed, depending on the content of the defence they would probably not feature in the case, save perhaps as a result of a question in cross-examination.

(iii) Mr J’s evidence in chief was to be kept tightly to the complaint. His cross-examination was to be in private session as requested by Mr Hill.

37. A review of the transcript shows that that blueprint, set on day 1, was adhered to and oral evidence was properly restricted to the complaint as was the questioning by members of the tribunal. This was carried forward into a full decision in which each complaint was considered in turn prefaced an identification of the relevant issues and a review of the evidence of both sides. When for instance during the evidence of Mr Hill he mentioned the word ‘fraud’, the chairman immediately told him that had nothing to do with the complaint. There are other specific examples to be found.

38. We are grateful to Mr Hamer in particular for his research and citation of authorities which we have considered. We have in the end found the case of Constantinides v. Law Society [2006] EWHC 725 (Admin) CO/1813/2005 to have the most direct bearing on the issues before us and to provide the principles which we should apply.

39. In disciplinary proceedings (in which dishonesty was not specifically alleged against the defendant) the tribunal admitted in evidence the judgment of Peter Smith J in civil proceedings in which he had held that the defendant had acted dishonestly when dealing with much wider allegations. Reference was made in the course of the disciplinary hearing to the judgment and findings. The most material paragraphs from the Constantinides judgment are at paragraphs 27 and 28, 32 and 33:

'[27] It appears that the tribunal chose to read the judgment in part because it took the view that because the appellant had asked for an adjournment of the original hearing on 25 September 2003, it did not lie in his mouth to object to the judgment being received in evidence.

[28] We agree that the mere fact that an adjournment had been sought was no basis for admitting the judgment, but there could be no reasonable objection to the tribunal reading it, provided it was clear and rigorous in its approach to that judgment. The judgment was admissible to prove background facts in the context of which the appellant’s misconduct had to be considered. But that was the limit of its function, in the particular circumstances of this case. The judge’s views as to the appellant’s dishonesty and lack of integrity were not admissible to prove the Law Society’s case against this appellant in these disciplinary proceedings. We are far from ruling that judge’s conclusions as to dishonesty cannot amount to findings of fact within the meaning of r30. There will be cases when a finding of fact, be it in a civil or criminal case, of dishonesty will be prima facie evidence of that dishonesty. But in the instant case the judge’s conclusions were far more wide-ranging than the allegations made against the appellant in the disciplinary proceedings. They were not relied upon by the Law Society as proof of dishonesty. It was recorded that the Law Society only intended to rely upon the judge’s description of the appellant’s behaviour and to limit the references to the allegations made in the disciplinary
proceedings. Furthermore, the tribunal directed itself that it was an expert and experienced tribunal which was bound to apply a different standard of proof to that applied by the judge.

... The tribunal, with its lay member was a skilled and expert body well able to reach its own conclusions, uninfluenced by the conclusions of another, even if that other was a judge of the Chancery Division. There is no basis upon which we could say that the tribunal's rejection of the judgment as a basis for a finding of dishonesty did not represent its state of mind in those circumstances we reject the first three grounds of the appeal.

We ought, however, to record that we do not see why it was necessary to refer to the judgment at all. The background facts were not in dispute. Provided they were clearly set out within the r4 statement there was no need to rely upon it save in so far as it emerged that the appellant disputed those primary facts. However, the r4 statement was itself a mixture of assertion of fact and argument. We would suggest that had a simple account of the facts been set out with a reference to relevant paragraphs in the judgment there would have been no further need to refer to it.'

40. The Judgment of Peter Smith J was held to be admissible to prove background facts in the context of the misconduct to be considered. It was made wide-ranging and the Court did not see why it was necessary to refer to it at all. There could be no reasonable objection to it being read, so long as the tribunal was clear and rigorous in its approach to the judgment. It was an expert and experienced tribunal.

41. The contrast between the potential prejudice resultant upon the findings of a high court judge as to dishonesty and that asserted before us by Mr Hamer is manifest. For instance the litigation documents contained no more than what the tribunal knew were only assertions to which no defence had been served because of the Agreement. The letters/emails were similarly known to be just assertions and would have been ignored by the tribunal which clearly was focussed on the relevant issues.

42. We agree with the approach of the tribunal on 20 October 2009. The documents complained of were admissible as background material in any event, but we add that the litigation documents and Mr J’s documents were in addition relevant to the defence pursued. The issue was one of case management. It was the tribunal’s duty to ignore the unproven references to fraud and to focus wholly and only on the complaint. This the record shows that they did clearly and scrupulously. It is amply demonstrated not only by what was said in the course of the hearing by the legal assessor on their behalf and by what was said by the chairman, but also by the very focussed conduct of the proceedings.

43. Further, unlike the situation in Constantines, the IC did not read out large parts of the documents complained of. It did not in fact rely upon them to seek to prove the Complaint. Perusal of the transcript of day 1 shows that Mr Cope and Mr O’Fathaigh agreed to a sensible way forward.

44. Following the comments of the court in Constantines (which did not affect the result), we cannot see the necessity to have included in the bundle the vituperative correspondence from Mr J, but it was in fact background material from a member with a duty to report and was prayed in aid by Mr Hill as showing mala fides. By the same token, we consider that Mr J’s first witness statement should not have followed his affidavit slavishly but should have been solely linked to the complaint which did not include the word ‘fraud’. However, falsification and misrepresentation of documentation and the improper making of profit remained a part of
the IC’s case throughout and the tribunal held that Mr Hill had sought to conceal his conduct. We agree.

45. Mr Hamer in his skeleton argument refers to the following passage in the record of decision of the tribunal:

‘The tribunal read and took into account and considered all the documents admitted before it, and heard and has taken into account the oral evidence from the IC and the defendant. The fact that not all evidence and submissions are expressly referred to in this record does not mean that they have not been considered and taken into account...The tribunal has seen the draft Statement of Claim and the Settlement Agreement. Some of the subject matter of those documents relates to the subject matter of this complaint.’

46. He submits that ‘read and took into account and considered all the documents admitted before it’ imports that the tribunal had improperly taken into account the documents to which objection is taken. We note the specific reference to the Statement of Claim and the Settlement agreement and the comment ‘Some of the subject matter of those documents relates to the subject matter of the complaint’. Mr O’Fathaigh submits that the tribunal was in fact referring in the first passage to relevant documents. We agree. This is not only supported by the later passage, but to our minds of much greater significance by the exchanges on day 1 and the whole conduct of the proceedings.

47. Mr Hamer also submits that the tribunal should have permitted Mr Hill to adduce in rebuttal the correspondence received in January 2010 from company O dealing with the effect of the Agreement. The tribunal was clearly right in its approach. Mr Hill’s case as to the effect of the Agreement on the disciplinary proceedings was an entirely discrete matter for the tribunal alone. Indeed, it had already held that Mr Hill’s contentions were misconceived on day 4.

48. We have touched on the role of the Legal Assessor. He is not to be treated as a judge directing a jury. We have already alluded to his interjection on day 1 of the hearing and it was he who put forward the proposal that Mr J should be cross-examined in private. The fact that the hearing was conducted in a structured manner focused on the complaint would of course have been known to him. There was no need for him to warn the tribunal of what it knew and was patently acting upon.

The temporary absence of a tribunal member and the transcript issue

49. On day 4 of the hearing at about 14:00, the Chairman stated that the tribunal wished to rise at 17:00. It had, we think, been anticipated that Mr Hill’s evidence would be heard and completed that day but matters had been delayed by a submission of no case to answer. The hearing had originally been estimated to last 2 days but was by now on day 4. In the course of Mr Hill’s evidence there was the following exchange:

‘THE CHAIRMAN:
I am sorry Mr Cope, could I just mention something; it is possible under the rules if everyone agrees that we could continue in Mr Q’s absence with just two members of the tribunal after he left at five.

MR COPE:
Yes. I do not think you would need agreement to do that, you have a discretion to do that.

THE CHAIRMAN:
Well I would like your agreement because if he got the transcript he would get the flavour of what has gone on.
MR COPE:
Do I take it you will be ordering the transcript of the last two days?

THE CHAIRMAN:
Yes, I can do.

MR COPE:
I think on that basis if there is to be a transcript I would certainly have no objection to Mr Q leaving at five.

CHAIRMAN:
Yes, we will have a manuscript. Do you have any objection Mr O’Fathaigh?

MR O’FATHAIGH:
No. I think what you are suggesting is that you continue after five and Mr Q has the benefit of a transcript and you will then meet again and confer and then give your decision?

THE CHAIRMAN:
Well we will try and see how far we get.

MR O’FATHAIGH:
Are we going to try and finish Mr Hill today so when we meet next time it will just be legal submissions and decision time?

THE CHAIRMAN:
If that is possible.

No doubt at about 17:00, Mr Q left. The transcript then records:

MR O’FATHAIGH:
If the transcript could be marked that Mr Q is leaving and the Committee Administrator is leaving and I will wait and then begin again.

MR COPE:
Do I take it that Mr Q does not have any further questions of Mr Hill?

MR Q:
Not at this stage, no.

MR COPE:
It may be on the next occasion his evidence will have been completed and there might not be a further opportunity. If Mr Q does have other questions then we could recall Mr Hill.

50. Mr Q had heard Mr Hill’s evidence for about three hours and left after cross-examination had begun. He was absent for most of the cross-examination. At about 18:35, cross-examination finished and the proceedings were adjourned:

‘THE CHAIRMAN:
Well we are going to have to adjourn now. We have got some questions. On the next occasion there will be re-examination and then we will put out questions and I think Mr Q may have some other questions and then we will hear closing arguments.’

51. The adjournment was from 18 December 2009 to 27 January 2010. During discussion as to preliminary matters, Mr Cope raised the question of the transcript:
'MR COPE:
I have an application to make but first I would like to make a point about the way proceedings were completed on the last occasion. I understand you wanted to see a transcript of the hearing on 17 and 18 December. I have not myself seen a transcript. I wonder if you have copies and, if not, is there a problem about that.

THE CHAIRMAN:
I have seen a copy. Instructions were given by me that copies were not to be generally circulated simply because of the cost. They are very, very expensive to produce. They are for ICAEW’s purposes completely.

MR COPE:
I understand. The Committee has had a copy but the parties not?

THE CHAIRMAN:
Indeed.

MR COPE:
It is just that on the previous occasion in November I received copies.

THE CHAIRMAN:
That was a matter of courtesy. You have an application to make you say?’

52. Mr Cope went on to make his application as to admission of further documents and then questions were put of Mr Hill by the tribunal. Mr Q put a question:

‘MR Q:
Going back to the last day, day 4 when I unfortunately had to leave early, I have obviously now read what took place in that half hour or so. One thing that I could not help but notice was how frequently you answered a question saying, ‘Mr L made that decision; Mr L told me to do it; no, that was Mr L’s responsibility’, et cetera. I do not know how many times. Someone coming in from outside reading the transcript will notice that you never said, ‘Yes, that is right; I think that is the right way to do it.’ Did you never question him on it?

A. I don’t have the transcript, I can’t remember all the things that you are referring to but in general my responsibility as Finance Director is to ensure that the rules laid down by the group were followed and were there to ensure the achievement of the company’s budget. Those were my responsibilities as Finance Director. Yes, I was there to challenge him. If it was not in the budget then I had a ‘right to veto’ because what you would then do is report it up the line. I would report it to my group Finance Director who was Mr P who is a chartered accountant as well, for most of the time. So, anything that was wrong or done outside the rule of procedure I would then refer directly to Mr P and there are times when Mr L would want to spend money on a marketing campaign that I knew was not in accordance with the budget; certain colleagues sitting in the back of the room, I would question many things and actually ensure the company’s profitability was maintained. That was the ultimate responsibility that we actually had. So, yes, I did challenge when I thought it appropriate and if I thought it was outside of the budget.’

53. The preface to the actual question concerned the number of references Mr Hill had made to Mr L having responsibility for matters, rather than himself. This was one of the main planks of Mr Hill’s defence and such references to Mr L and his responsibilities and instructions appear throughout the defence case. The question posed was ‘did you never question him or it?’ It was a general question and Mr Hill understood the question as shown by his answer to it. To
have been taken to each answer mentioning Mr L in the transcript before the question was put would not have assisted in his understanding of the general question and the giving of his answer to it.

54. As stated by the chairman at the opening of proceedings on day 1, a shorthand writer was in attendance for the purposes of ICAEW. If there is an appeal from a decision of a tribunal of the Disciplinary Committee a transcript is made for the purposes of that appeal and is sent to the appellant, IC and panel of the Appeal Committee.

55. It is not the practice to provide a transcript during a hearing, but in any complicated dispute in any jurisdiction when there are adjournments of significant length it is helpful for both the adjudicator and parties to have a transcript. That is not to say that it is required for there to be a fair hearing.

56. A transcript was made available to Mr Cope and Mr O'Fathaigh after the first two days’ hearings on 10 and 11 November 2009. The chairman had so instructed according to the transcript (day 3). The interchanges on day 4 show that the chairman had in mind that Mr Q would be able to consider the transcript before the next hearing. Mr Cope might have assumed that if a transcript was going to be made available to Mr Q, then (as before) one for day 4, too, would be made available to the parties. But he had indicated before there was any mention of the transcript that he had no objection to Mr Q being temporarily absent. Mr O’Fathaigh was more specific when asked whether he consented to the proposal:

‘I think what you are suggesting is that you continue after five and Mr Q has the benefit of a transcript'

57. We consider that although the issue does not make for an unfair hearing and both sides were treated equally, as neither party was provided with a transcript for day 4, it is difficult to understand why the transcript was not released to the parties in the circumstances. Once transcribed, we believe that there are no restrictions on - or costs of - sending it by email, and the chairman had arranged for the transcript of the first two days to be released.

58. We do not know the chairman’s reasons beyond what appears in the transcript and we are keenly aware that it is inappropriate to make judgments in the absence of full knowledge. However this panel feels that it would have made a different decision as to releasing the transcript in the given circumstances.

59. Turning to the law germane to the absence of Mr Q, central to Mr Hamer’s submission is that the question is one of jurisdiction not procedure and that waiver (which is denied in any event) is immaterial. In short, a want of jurisdiction cannot be waived.

60. One of the principal objects of the ICAEW, as set out in its Supplemental Charter of 1948, is ‘to maintain high standards of practice and professional conduct by all its members’. ICAEW also has important statutory functions of a supervisory character, for example with regard to regulation of company auditors. Under Clause 15 of the Supplemental Charter, ICAEW can make Bye-laws for the purposes of regulating its affairs and Clause 16 gives power to make regulations, provided that those regulations are not inconsistent with express provisions contained within the Charter or the Bye-laws. ICAEW is a public authority within the meaning of the Human Rights Act. It is susceptible to judicial review and may be challenged for breaches of Convention Rights.
61. Disciplinary Bye-laws 4, 5 and 6 make members, firms, regulated firms and provisional members liable to disciplinary action. The Schedule to the Disciplinary Bye-laws provides for the constitution and functioning of the three committees: Investigation Committee, Disciplinary Committee and Appeal Committee, each having the power to make regulations for the performance of their functions. All three Committees have lay representation.

62. Bye-law 19.1 provides as follows:

‘19.1 On receipt by the Disciplinary Committee of a formal Complaint, the Chairman of that Committee or, failing him, any Vice-Chairman of that Committee-

(a) shall appoint three of its members, two of them being members of the Institute and the third not being an accountant, as a tribunal to hear that Complaint; and

(b) shall appoint one of the three as chairman of the tribunal.

(2) If, in the case of a tribunal so appointed, any member of the tribunal

(a) is for any reason unable to attend the hearing or any adjourned hearing of the formal Complaint; or

(b) is in the course of the hearing unable to continue so to attend,

the remaining members, if not less than two in number, may at their discretion proceed or continue with the hearing; but if the defendant is present or represented at the hearing, they shall do so only if he or his representative consents.’

63. Pursuant to Bye-law 23 a tribunal can find a complaint proved and proceed to make a disciplinary order including exclusion from membership if appropriate.

64. Such powers cannot be lawfully exercised unless the tribunal is one properly constituted under Bye-law 19 nor, it seems clear, can powers be conferred by waiver when not otherwise existing.

65. Regulations made pursuant to Bye-laws cannot give jurisdiction to make an order when none exists under those Bye-laws. If however the absence of Mr Q did not breach Bye-law 19, then the question falls to be resolved by considering first the issue of waiver and secondly the question of whether he had a fair hearing. Jurisdiction cannot be conferred by waiver or consent (Essex Incorporated Congregational Church Union v. Essex County Council [1963] Ac 808, 820-821). Whether or not the tribunal has the jurisdiction to continue with two members and then return to the full three must depend on the proper construction of disciplinary Bye-law 19.

66. In identifying the principles which we should apply we have not found the criminal cases cited as of significant assistance. In Spencer Bower 'The Law relating to Estoppel by Representation 4th Edition as p.172 and 173, the issue of estoppel as a basis of a jurisdiction is considered as follows:

‘No contract or consent of a party to litigation can confer jurisdiction on any person not already vested with it by the law of the land, or add to the jurisdiction lawfully exercised by any judicial tribunal; it is equally plain that the same results cannot be achieved by conduct or acquiescence by the parties. In the words of Lord Reid: ‘...it is a fundamental principle that no consent can confer on a Court or tribunal with limited statutory jurisdiction any power to act beyond that jurisdiction, or can estop the consenting party from subsequently maintaining that such Court or tribunal has acted without jurisdiction.’ This is one aspect of the general rule that parties cannot by contract or estoppels legitimate action which is ultra
vires: any such attempt to create or enlarge jurisdiction is in fact the appointment of a
judicial officer by a subject, and as such constitutes usurpation of the Royal Prerogative.

On the other hand, it may be that nothing more is involved than a mere irregularity of
procedure or non-compliance with statutory conditions precedent such as time limits) for
the validity of a step in the litigation, of such a character that, if one of the parties be
allowed to waive the defect, or to be stopped by conduct from setting it up, no new
jurisdiction will thereby be impliedly created and no existing jurisdiction impliedly extended
beyond its existing boundaries (other than procedural boundaries). If that is the case, then
the estoppels will be maintained, and the affirmative answer of illegality will fail.....'

67. We are fortified in our conclusion that, if we are concerned with procedural unfairness and not
by lack of jurisdiction, unfairness may be waived by the European Court of Human rights
decision of Pfeifer and Plankl v. Austria, (1992) 14 EHRR 692 and Bulut v. Austria (1997) 24
EHRR 84, which are to the same effect (i.e. that it can be waived) in relation to Article 6
ECHR.

68. Mr Hamer referred us to the case of Doyle v. Restrictive Trade Practices Commission and
F.H. Sparling and Canadian Javatin Ltd and Another Court of Appeal OHAW [1986] 1 FC 362
and Mr O'Fathaigh referred us to the case of Micheline Montrenil v. Canadian Human Rights
Commission and Canadian Forces 2008 CHTR 32. We consider that those cases are
consistent with, and authority for, the principles we apply. In so far as Mr O'Fathaigh
contends that Montrenil supports an argument that there can be waiver of jurisdiction, we
disagree. We further disagree with his submissions that the Regulations can be of relevance
if the Bye-laws do not permit the temporary absence.

69. Turning to Bye-law 19, we agree with Mr O'Fathaigh's submission that it does not preclude
what happened, that is an absence by Mr Q for a relatively short period with consent and his
later return to adjudicate. In construing the Bye-law we have had regard to the problem faced
by disciplinary tribunals from the absence of a member appointed through illness or mishap at
the commencement of or during a hearing. There will be an abortive hearing unless the Bye-
law provides a route to continue with fewer members. In such circumstances it would
manifestly be unjust for the missing member to be a decision-maker. It is to this type of
situation that we consider the Bye-law is directed and its purpose is to resolve.

70. In the Disciplinary and Regulatory Proceedings by Brian Harris OBE QC fifth Edition he says:
'Composition of tribunal after adjournment
9.63 If the hearing of a case has to be adjourned, the composition of the committee at
the adjourned hearing should normally be the same as that of the original tribunal. If the
continued participation of a tribunal member at an adjourned hearing is not possible, for
example, because of illness or death, there is no reason why, consistent with the rules of
the particular tribunal, the hearing should not proceed in his absence, provided only that the
tribunal remains quorate. What would not seemingly be permissible is for a tribunal
member, having missed one sitting, to adjudicate at a subsequent sitting, at least if
anything other than business of the most formal nature had been conducted at the missed
hearing. (Compare the magistrates' Courts Act 1980)'

71. The heading and text suggest to us that this paragraph is directed towards the ordinary
problem presented if a member is unable to attend an adjourned hearing because of illness
or death, rather than a fairly short absence by consent as in this case, where matters were
anyway covered adequately.

72. We find the absence of Mr Q and his continuing participation in the tribunal not to have been
precluded by Bye-law 19. The tribunal was empowered to make such directions as it
considered appropriate to deal with the situation. The Disciplinary Committee Regulations provide at clause 28 (amongst other things):

‘The hearing shall be informal and the strict rules of evidence shall not apply. Subject to these regulations the tribunal may adopt any method of procedure which it may consider fair and which gives each party an opportunity to have his case presented...’

73. As to waiver, there is no doubt in our minds that Mr Cope expressly agreed to the absence of Mr Q as did Mr O’Fathaigh on the basis that Mr Q would consider a transcript of the witness evidence and return as a member of the tribunal. It was of course unfortunate the proceedings on day 4 had been delayed by events such that if the tribunal did not sit late, the cross-examination of Mr Hill could not be completed in 2009. The chairman called attention to the undesirability of this and of course Mr Cope would have been aware of this as an advocate. It would have been easier for the tribunal to have adjourned at 5pm rather than sitting late to enable cross-examination to be completed. But the adjournment was to be lengthy and the advantages in continuing were clear and included the advantage to Mr Hill in the finishing of his cross-examination.

74. Bye-law 19 was not specifically referred to in the interchanges. Mr Cope was seeking to be helpful in stating his understanding that the tribunal had power to continue in Mr Q’s absence. We find that he was correct in this understanding, but of further significance is the effect on our judgment as to the fairness of the proceedings. Mr Cope is an extremely experienced solicitor in the field of ICAEW disciplinary proceedings, more so than any other of whom we are aware. He is well regarded. Although the question of the attainment of fair hearing was the responsibility of the tribunal, the very fact of consent was in itself a vital link and a pointer to the likelihood of fairness.

75. We have reviewed the evidence given by Mr Hill both before Mr Q left and during his absence in the light of the findings of the tribunal so as to form a judgment as to whether in this case the absence rendered the hearing unfair. The material findings with regard to the first group of particulars are paragraphs 31, 41, 46, 52 and 58 of the tribunal’s reasons which were made after a review of the evidence and cases of both sides. These findings, as with the findings on the last 7 particulars, were made on the basis of a factual matrix as to which there was no significant dispute or (in the case of documents which were before the tribunal) room for dispute. This case was not dependent upon a judgment as to disputed evidence or the veracity or demeanour of witnesses. The common theme in Mr Hill’s defence put forward in his witness statement, defence, skeleton argument and final submissions was reflected in his answers in cross-examination as is clear from our reading of the transcript. In no way in this case do we feel disadvantaged in forming our judgment by not having heard Mr Hill give evidence. Mr Q was in fact present for Mr Hill’s fairly lengthy examination in chief and part of the cross-examination. There was no actual prejudice to Mr Hill by reason of Mr Q’s absence during the major part of the cross-examination.

76. As to the role of the legal assessor, we consider that the question of Mr Q’s proposed absence should have been considered by the tribunal, Mr Cope and Mr O’Fathaigh by reference to the specific controlling Bye-law. We also consider that, although in this case we do not find that the Bye-law on its proper construction proscribed what happened by agreement, nor were the proceedings rendered unfair, it is plainly undesirable for a tribunal member to be absent even with consent. It would in our view give rise to unfairness in many cases, particularly those which there were material conflicts of evidence which the resolution of which could be affected by the demeanour of the defendant in evidence. In this case, the undesirability of not completing cross-examination was forefront in the minds of the tribunal (and probably the legal assessor) and legal representatives; in the result we find the course adopted was both permissible and fair. The possible consequences of such a decision need no elaboration in the light of the challenge made before us.
77. For reasons given we reject the submissions that the tribunal proceedings were irregular and dismiss the appeal against the findings that complaints 1 to 14 were proved.

78. However, we have also in our deliberations considered what would have been the appropriate order had the contentions raised in this appeal been upheld by us. In so doing we have carefully excluded from our minds matters that did not form part of the charges (such as unanswered and unproven allegations in Mr J’s affidavit and the Particulars of Claim) but which were referred to in the bundle, and have clearly and rigorously restricted ourselves to the matters in the 14 allegations in the two complaints. As the tribunal held, Mr Hill’s professional misconduct is very serious and deserving of a severe penalty. In all the circumstances it would not be in either the public interest nor in the interests of the profession for the order merely to have been rescinded. Accordingly, the courses open to us would have been to remit for a rehearing or, if we thought fit, make such order or orders as the tribunal had power to make.

79. We are conscious that in most cases where there has been an irregularity below, the appropriate course would be to remit and that the alternative should be exercised sparingly and only in circumstances where, taken as a whole, the hearing before the tribunal of the disciplinary committee and the panel of the appeal committee give rise to a fair result arrived at by fair methods. In this regard we have considered Halsbury’s Laws of England Fifth Ed. Vol 61 para 64.5 and in particular Calvin v. Carr [1980] AC 574 and Modahl v. British Athletics Federation [2002] 1WLR 1192. We have also noted the approach of the Court in Bolton v. Bolton [1946] 2 AC ER 908 where, in spite of a finding that there had been a serious irregularity below in circumstances where there had been a grave conflict of evidence, nevertheless as the result was so clear it was held wrong to send it back and the appeal was dismissed.

80. The exceptional features of this case which would have caused us to make the same findings on the complaint as the tribunal are:

(i) It is obvious to us on the basis of a factual matrix, including accounting documents and signed representation letters not in dispute or capable of dispute, that Mr Hill was both in breach of fiduciary duty and failed to report related party transactions in the respects alleged. We agree with the findings of the tribunal as set out in the full record of its decision.

(ii) The tribunal rejected Mr Hill’s explanation and defence as summarised under ‘reasonings’ in paragraph 66 of their decision. We agree. The explanations and defence put forward were misconceived and without merit. Indeed, we are surprised that any professional man with Mr Hill’s experience put the matters forward as a defence, save perhaps for the matter of the effect of the Agreement which was a matter of law. As to this, we have noted that the arguments were put forward by Counsel and Mr Cope without reference to any authority. It was left to Mr O’Fathaigh to put authorities before the tribunal.

(iii) Mr Hill in the course of his evidence made a number of admissions. He asserted on several occasions that he was not aware of all the relevant law and regulations both with regard to fiduciary duty and disclosure obligations at the time relevant to the complaint. Of course this is no defence to charges of professional misconduct if he ought to have known. The tribunal held that he did have or should have had the requisite knowledge. It was for the tribunal not Mr Hill to determine the state of knowledge and conduct of an accountant in good standing and to judge his conduct against such standard. We set out below the relevant passages.

As to fiduciary duty:
‘Q. But would you agree that the two central pillars of fiduciary duty are that you must not make a profit or be in conflict with the entity to which you owe the duty without that entity having given you full and informed consent?

A. Yes, but with the reservation. What I mean by the reservation is that that party has given informed legal consent, it signed the settlement agreement that details all these items and therefore has given informed consent in law and that is the legal advice that I have been given.

Q. Can I ask you this then, is it your evidence that at the time of the transaction you did not know that you should not make a profit or you should not put yourself in conflict with your employer?

A. That is completely correct.

Q. You did not know that?

A. I did not know that.’

(Day 4)

As to the related party Complaint:

‘Q. Did you seek assistance from any person, professional body or any other person as to am I entering into an improper transaction?

A. I believe that one only seeks assistance if you believe you are doing wrong. I did not know that there was a potential conflict. I can actually say hand on heart I did not know. Had I known and had I known what I know today which I am supposed to have got directors approval, had it in writing, put it to a board, that is one of the reasons I wish I had got documentary evidence to prove that Mr P approved certain things. I wish I had that information.

Q. I do not know who but one of this panel is an auditor and they will be keen to hear from you how you did not recognise a related party transaction or did not believe it was improper with your experience?

A. Because what you are talking about here is two entirely different matters. When you go into audit what you are trying to do is to audit the records to say true and fair. You are not auditing the individual transactions. I am not a lawyer. I have been aghast about all of what I have seen. I did not know half of what I knew today. Hindsight is a wonderful thing but at the time I thought that I was doing what the company had employed me to do.’

(Day 4)

As to the two payments of £30,000:

‘Q. But did it not occur to you as an individual that on behalf of a company buying or renting property which you owned half of there was something wrong about that?
Now looking back, yes, I agree, but at the time no because what I was focused on, I had an approved budget of £145,000, we spent £60,000 great; how wonderful is this. I have saved the employment – and I think we are missing one of the key things of this one, I saved or Mr L and myself saved the employment of some very close friends I had worked with, at that point I joined in 1993. I was being asked to make them redundant. Now, I am sorry that to me was I don’t agree with it. You talk about how one does things. At the time I thought I was doing the group a good service, because I found a building and I could not find any other way to rent it. I saved a lot of peoples jobs. I saved a quarter of a million pounds redundancy. The fact I owned it to me was not an issue. I would have thought it was more of a benefit for the company because they get for a period of time a friendly landlord.

THE CHAIRMAN: You say you do now consider that there would be something out of bounds?

A. Correct, and it is partly because of now my knowledge of the law which I was not aware of at the time.’

(Day 4)

As to the trustee payments:

‘Q. You are a trustee of a pension scheme, that was not what that £25,000 was, it was not a loan repayment, you have written it down as such on the cash book but it is not a loan repayment, it is a payment of fees?

A. Correct.

Q. To a company that you control?

A. Correct.

Q. Do you have any comment on that because it does not strike me as being accurate?

A. It is the way that I was instructed to record it and basically in the actual accounts the accounts show that it was netted off. I can only sit here and tell you what I was instructed to do, how it was to be disclosed.

Q. Do you think that is correct as a chartered accountant?

A. In hindsight, no.’

(Day 4)

As to G:

‘Q. The point I put to you is this that it was a completely improper transaction for you to get involved in?

A. At the time I can only...

Q. You know it was wrong?
A. At the time, no.

Q. As a chartered accountant you never thought to say ‘I will get some evidence that I can enter into this transaction?’

A. You only get evidence if you think you are doing wrong, if you do not know you are doing wrong you don’t. I am sorry you do not get legal advice until you get sued. I defy anybody to go and get advice on something which they do not know if they are doing right or wrong. I did not know. I keep on saying that all the way through.

As to H:
‘Q. Do you see the awful conflict that you as finance director and your managing director were privy to this information relating to the rent budget and also setting the rent for the premises you occupied. I am sure you will agree now that is a horrific conflict?

A. No, that is where I disagree. It depends on what hat you are wearing. I have always tried in these circumstances to put my company A Ltd hat on. The rent was a fair rent based by third party. The lease was written in favour of company A Ltd. All I can do in circumstances like this I tried to put myself in the shoes of my employer. I thought at the time it was the right thing. Now I know where you are coming from regarding the law, regarding the fact one should have got disclosure, I cannot deny that and hindsight and regret are one thing, but at that time I thought I was doing the right thing.’

Further, as to the related party complaint:
‘THE CHAIRMAN: Is it fair to say then that the second leg of this complaint you accept?

A. It is not the fact that I accept it; some elements I accept and some elements I do not. I still always question the requirements under FRS8 at that time in respect of transactions with a company. If those transactions were me as a director I fully agree that I have breached FRS8. But my understanding at that time of what FRS8 actually said is not then encompassing transactions by a company...

Q. Does it not describe a related party transaction?

A. It does, but if you read the support which I have put within my defence was that FRS8 is a very very confusing standard at that time. It has now been refined and more elaborated and makes it very very clear what is there. All I am trying to say to you is back then I did not know. Now having done more research and especially seeing the new FSA8 I would agree.

MR O’FATHAIGH: Can I just finish off by saying your evidence is you did not know the related party transaction because the auditors did not tell you what a related party transaction was? Is that what you are saying?
A. In essence, yes.’
(Day 4)

(iv) No further evidence was necessary for there to be a fair judgment by the panel.

81. We have already stated that we agree with the findings of the tribunal which were fully justified on the evidence. We have considered the case under 4 main areas:
- first, the need not to make secret profits at the expense of his employer (i.e. for transactions to be authorised in advance to avoid a breach of fiduciary duty);
- second, the statutory requirement in the Companies Act to disclose any conflict of interest including interest in transactions to the rest of the board of directors;
- third, the statutory disclosure requirements in the Companies Act and professional standards (i.e. the need in any event for disclosure in the accounts of related party transactions, whether they were approved or not); and
- fourth, the need to disclose related party transactions to the auditors (in any event, but especially when asked to do so).

82. Mr Hill states that he had former employment for eight years in company I, latterly as a senior audit manager. This employment would in our experience have included responsibility for considering whether audit clients had appropriate internal controls, whether they had adequately disclosed related party transactions (including in particular transactions between a company and its directors), and – specifically – whether the accounts he was auditing complied with the Companies Acts and accounting standards (including the provisions relating to disclosure of related party transactions).

83. Mr Hill also would have been responsible in the latter years as a senior manager for ensuring his staff were familiar with the statutory and professional requirements and that they were properly applied on those audit engagements allocated to him to manage. The panel includes three chartered accountants who have had extensive audit experience in large firms, in one case for over 30 years.

84. On the first area, in our judgment and experience a chartered accountant would have been well aware of his or her fiduciary duty not to make profits out of transactions with his employer, when the employer did not know that he was doing so, i.e. earning secret profits. No training is necessary to adopt an open and honest approach, but Mr Hill’s training is likely anyway to have covered such duties. Whatever his technical knowledge of his precise fiduciary duties, his training and his many years of experiences as an auditor would have taught him that he should not have undertaken the relevant transactions, or that he should have sought advance approval in a transparent manner. In any event, Mr Hill’s conscience should have told him that he should be open about what he was doing and that the secret transactions from which he made substantial gains did not, to put it colloquially, pass the ‘smell’ test.

85. Secondly, the long-standing statutory requirement that directors must disclose conflicts of interest and interests in transactions to the full board of directors is set out at length in the Companies Act. It is well known generally to directors and the auditing profession.

86. Third, there are extensive disclosure requirements in both the Companies Act and professional standards, including Financial Reporting Standard 8 (FRS 8), for statutory accounts. These requirements are also well known in principle (although we accept that they may need to be consulted to check on detail) and are not new. Many were first introduced some 30 years ago by the enactment of sections 54 and 55 of the Companies Act 1980, entitled ‘Disclosure of transactions involving directors and others’. (That Act has since been consolidated on a number of occasions into more recent Companies Acts). They were thus
introduced several years before Mr Hill undertook the extensive training and examinations required to become a chartered accountant. It is likely that his training at company I would also have supplemented this; his practical experience there would most certainly have encompassed it as disclosure in accounts needs to be checked on every audit.

87. The syllabus for the chartered accountancy examinations which Mr Hill would have sat includes company law and trust law. Parliament has charged auditors (not directors or lawyers) with forming an opinion and issuing a report to shareholders on whether the accounts they are auditing comply with the Companies Act: this is bread and butter work for auditors. Failure to comply with the Act is often a criminal offence and compliance is taken seriously. Checking such compliance is one of the purposes of an audit.

88. Finally, there is the question of disclosure to the auditors. Mr Hill seeks to blame the auditors, who were unaware of his secret profits, undisclosed beneficial interests and inaccurate bookkeeping, for not detecting the matter and reminding him of his duties. This does not make sense. It was Mr Hill who knew what was going on. He was repeatedly asked to and did sign representation letters addressed to the auditors, in his capacity as Finance Director of the company and separately as trustee of the pension scheme, that all matters had been properly disclosed. He appears to have done so on 11 occasions (for some of which the original letter is now missing), some as trustee for the pension scheme and some as Finance Director for the company. These were false. It is not disputed by Mr Hill that there was no disclosure of any of the transactions listed in the complaint. Moreover, company I (who have also made a complaint) have stated that Mr Hill did not disclose to them his interest in any of these transactions, despite being specifically asked about related party transactions. Mr Hill has not disputed that he signed the 11 letters.

89. In summary, Mr Hill relies on the defence that he did not know of his legally required duties. As explained, we reject this both as inadequate and as in all probability untrue in any event. We are satisfied that Mr Hill well knew of the duties of avoiding undisclosed conflicts of interest, and of accurate disclosure of related party transactions to the Board, the auditors and in the accounts. Mr Hill also asserts that he was acting under instructions from his co-director. Given that co-director’s own role in the matter that is not a satisfactory answer, but in any event is no excuse for a chartered accountant who should have challenged the co-director.

90. Mr Hill also claims that some of the transactions were acceptable, as the costs of them were within the company’s budget and/or there were tax advantages to the company (in that tax relief could be obtained on the expense it so incurred). We do not regard either of those defences as remotely overriding Mr Hill’s moral, fiduciary and statutory duties to act openly in his dealings to avoid undisclosed conflicts including large secret profits, and to disclose the true position in the audited accounts and to the board and auditors.

91. There is no doubt in our minds that the tribunal’s crucial findings that Mr Hill knew or ought to have known his material responsibilities both in relation to his fiduciary duties and duty of disclosure are well founded. Indeed, although we do not see it as our province to do other than review the findings and restate them if we think appropriate, it is our view that the departures under both heads of the complaint are so far removed from the standards that the profession and public expect from a member in good standing, more particularly a member with Mr Hill’s professional background, that we find an assertion that he did not know that he was doing wrong stretches the boundaries of credibility to breaking point. Were it otherwise, as Mr Hill maintains, and he was unaware of his wrongdoing, then the departures from the proper standard, and in our view the common notion of what is acceptable conduct for a professional man, are so manifestly grave as in any event to render him totally unfit to engage in practice. As held, the misconduct alleged and proved is very serious.
92. This panel does not consider that the interests of justice could be served by a rehearing; by the interests of justice for clarification we state that we include Mr Hill’s own interests because he would face a further hearing of up to 6 days and as he has no credible defence the adverse outcome is inevitable. (Mr Hamer on Mr Hill’s behalf argued cogently against a rehearing, explaining the difficulties involved, albeit in the context of a submission that the Order should be rescinded.) Thus, in the hypothetical circumstances that we had concluded that there had been an irregularity or irregularities before the tribunal, we would have rescinded the decision but found the complaints proved.

93. As to the order made by the tribunal, we consider that the order for exclusion was entirely appropriate. Mr Hamer has challenged the recommendation that no application for readmission be entertained for a period of seven years by reference to the sentencing guidelines suggest that 10 years is appropriate for complaints involving dishonesty, five years for a criminal offence followed by an immediate custodial sentence, and two years for other exclusion orders. This is helpful guidance to act as a starting point but no more. It is not rigid nor meant to be as demonstrated by the exhortation that a member guilty of serious dishonesty should be informed that they may never be readmitted.

94. The key principles which apply to sentencing are:
- maintaining the reputation of the profession
- correcting and deterring misconduct
- upholding the proper standards of conduct in the profession
- protecting the public

95. The tribunal made its findings relevant to its order, which we entirely endorse. Mr Hill’s professional misconduct was unacceptable, repeated, inexcusable and very serious. The recommendation of seven years before an application for readmission can be considered is appropriate.

96. For the avoidance of doubt, had we rescinded the tribunal’s order and been required to substitute our own we would have ordered exclusion, made the same recommendation and ordered the same fine.

97. In relation to the appeal against the fine imposed and the award of costs, we were invited in particular to consider Mr Hill’s means as well as the appropriateness otherwise of the sums.

98. We heard about Mr Hill’s means in private sessions and have prepared a report of our findings which should not be made public so as to preserve the privacy afforded. For reasons given therein, we have concluded that Mr Hill has or has access to significant funds and we do not find impecuniosity. The fine is entirely appropriate.

99. As to ICAEW’s costs, they amounted to £38,584 in the hearing below, of which £32,000 were awarded against Mr Hill. We have concluded that in the circumstances, and particularly in the light of our finding that Mr J’s written statement should not have included explicitly a reference to fraudulent conduct but should have been directed towards the complaints and summary of complaints, the appropriate order is one of three-quarters of the sum of £32,000 awarded, namely £24,000. As to the costs of appeal, they are relatively modest at £13,128 in the context of this case. We note that ICAEW (unlike Mr Hill) did not instruct external Counsel. We find that we should reflect the very limited change referred to above which should have been made to the process and interlocutory order below by directing that Mr Hill pay the same proportion (rather than all) of the costs of the appeal, namely three-quarters of them, or £9,846.
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<td>Chairman</td>
<td>Mr Adrian Brunner QC</td>
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<td>Mr Richard Sweetman FCA</td>
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<td>Non Accountant Member</td>
<td>Mr Hew Mathewson CBE</td>
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CESSATION OF MEMBERSHIP

9 The following individual has ceased to be a member because of failure to pay outstanding fines and costs:

Mr Adam Woricker of Chelmsford
Mr Peter Stokoe of Tyne and Wear
Mr Martin David Clifton of Derbyshire

The ICAEW takes all necessary steps including legal proceedings to recover the money it is owed.

INVESTIGATION COMMITTEE CONSENT ORDERS

10 Mrs Carol Ball ACA

Consent order made on 7 January 2014

With the agreement of Mrs Carol Ball of Mortimer Burnett Limited, The White House, Mill Road Goring, Reading, RG8 9DD, the Investigation Committee made an order that she be reprimanded, fined £1,000 and pay costs of £605 with respect to a complaint that:

Between 1 January 2012 and 27 August 2013 Mrs C Ball ACA engaged in public practice without holding a practising certificate, contrary to Principal Bye-law 51a.

11 No publication of name

Consent order made on 13 January 2014

With the agreement of a member the Investigation Committee ordered that the member pay costs of £390 with respect to a complaint that:

On 25 June 2009 a member entered into an individual voluntary arrangement under the provisions of the Insolvency Act 1986.

The Committee directed that the member should not be identified by name when the order is publicised.
12 Mr Andrew Cooper ACA

Consent order made on 13 January 2014

With the agreement of Mr Andrew Cooper of 650 Anlaby Road, Hull, HU3 6UU, the Investigation Committee made an order that Mr Cooper be severely reprimanded, fined £7,500 and pay costs of £2,217 with respect to a complaint that:

1. Mr A Cooper ACA, on behalf of his firm, X, failed to comply with a condition imposed by the Audit Registration Committee in a letter dated 7 December 2011, in that he failed to obtain and submit the results of a hot file review in respect of Y Limited for the year ended 31 March 2012.

2. Mr A Cooper ACA, provided misleading information in an email dated 4 January 2013 in that he stated that the hot file review in relation to the audit of Y Limited for the year ended 31 March 2012 was with Z when this was not the case.

13 Mr Christopher John Langford

Consent order made on 17 January 2014

With the agreement of Mr Christopher John Langford of 93 Western Road, Tring, HP23 4BN, the Investigation Committee made an order that he be reprimanded, fined £1,500 and pay costs of £792 with respect to a complain that:

1. Between 9 January 2007 and 15 April 2013, Mr C Langford failed to comply with a written assurance he had given on behalf of his firm, X & Co, that he would send engagement letters to his clients notifying them of the basis of fees and the firm’s complaints procedures.

2. Between 9 January 2007 and 15 April 2013, Mr Langford failed to comply with a written assurance he had given on behalf of his firm, X & Co that he would obtain retrospective verification of all clients taken on after 1 March 2004.
REGULATORY DECISIONS
AUDIT REGISTRATION COMMITTEE

ORDER – 4 DECEMBER 2013

14 Publicity statement

Brooks & Co (Blaby) Limited, 9A Leicester Road, Blaby, Leicester, LE8 4GR, has agreed to pay a regulatory penalty of £600, which was decided by the Audit Registration Committee. This was in view of the firm’s admitted breach of breach of audit regulation 2.11, in that it failed to notify ICAEW of its incorporation and failed to apply for audit registration for the corporate firm within 10 business days.

ORDER – 15 JANUARY 2014

15 Publicity statement

Smith Cooper LLP, 2 Lace Market Square, Nottingham, NG1 1PB, has agreed to pay a regulatory penalty of £250, which was decided by the Audit Registration Committee. This was in view of the firm’s self reported breach of Audit Regulations 2.03a and 2.11 in that the firm failed to ensure that one of its members had appropriate affiliate status between March and November 2013.

ORDER – 15 JANUARY 2014

16 Publicity statement

Roffe Swayne, Ashcombe Court, Woolsack Way, Godalming, GU7 1LQ, has agreed to pay a regulatory penalty of £3,000, which was decided by the Audit Registration Committee. This was in view of the firm’s admitted breach of Audit Regulations 2.11, 4.04 and 4.05 for allowing an audit report to be signed by a principal within the firm who was not, at the time, properly appointed as a responsible individual.
ORDER – 15 JANUARY 2014

17 Publicity statement

S.C. Devani & Co, 37 High Street, Acton, London, W3 6ND, has agreed to pay a regulatory penalty of £3,000, which was decided by the Audit Registration Committee. This was in view of the firm’s admitted breach of audit regulation 6.06, for failing to comply with undertakings previously given to the committee.

All enquiries to the Professional Conduct Department, T +44 (0)1908 546 293