IN THE MATTER OF THE TAXATION DISCIPLINARY BOARD

Reference: TDB/2016/26

TAXATION DISCIPLINARY BOARD

Presenter

- and -

MR JOHN ANTHONY MEHIGAN CTA
(Membership Number 135210)

Defendant

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DECISION AND REASONS

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Introduction:

1. The Disciplinary Tribunal conducted a hearing by telephone on Sunday 21 October 2018 to consider the charges brought against John Anthony Mehigan (the Defendant).

2. The Tribunal was chaired by Ms Linda Lee (solicitor) sitting with Janet Wilkins (taxation member) and Bryn Anstice (lay member). The Clerk to the Tribunal was Nigel Bremner. The Defendant was not present but had agreed to the hearing being conducted by telephone. Representations prepared by himself and his solicitors Bird & Bird LLP had been submitted to the Tribunal.

3. The matter was heard under Regulation 15 of the Taxation and Disciplinary Board Regulations (2014) simplified procedure where the Defendant admits all charges.

4. The Tribunal considered the correspondence between the Taxation Disciplinary Board (TDB), the Defendant (and/or those acting on his behalf), and the CIOT; the minutes of the TDB investigation committee, the Financial Reporting Council (FRC) disciplinary report, including in particular the Defendant's admission by

email of 12 April 2018 to each of the allegations which are replicated in the Charges. It also considered the written submissions of the Presenter Mr Ben Smiley dated October 2018 and the written submissions of the Defendant and his representatives.

5. The Tribunal noted that by email of 4 October 2018 the Defendant's representatives had waived the necessary notice periods to enable an 'on-paper' determination of his case.

Charges:

6. The charges set out below make reference to the following rules of the Professional Rules and Practice Guidelines 2011 of the Chartered Institute of Taxation (the "CIOT") and the Association of Taxation Technicians (the "ATT") (the "PRPG 2011"):

(1) Rule 1.7 (Introduction)

(2) Rule 2.6.1 (Professional behaviour);

(3) Rule 2.6.2 (Professional behaviour);

(4) Rule 2.7.1 (Professional Indemnity Insurance (PII) and Personal Responsibility);

(5) Rule 2.10.1 (Obligation to notify the CIOT and the ATT).

Charge 1 (The "PII Charge")

The Defendant was in breach of the fundamental principle of professional behaviour in that contrary to Rule 2.7.1 of the PRPG 2011 he failed to protect his

clients and/or his practice and/or himself in that between 2005 and 2013 he did not have adequate PII cover when carrying out his professional work.

Charge 2 (the "Failure to Notify Charge")

The Defendant was in breach of the fundamental principle of professional behaviour in that contrary to Rule 2.10.1 of the PRPG 2011 he failed to notify the CIOT promptly that he had been notified of disciplinary and/or regulatory action begun against him by another professional body to which he belonged. In particular:

a) The Defendant was disciplined by ICAEW at a hearing on 14 April 2015.

b) The Defendant was informed of the disciplinary action being taken against him on 25 February 2015.

c) Yet, on the Defendant's own recollection of events, he did not inform members of CIOT staff of this until June 2015.

Charge 3 (the "Competence and Care Charge")

The Defendant was in breach of the fundamental principles of objectivity and/or professional competence and due care in that:

a) On 12 June 2017, the FRC published the outcome of disciplinary cases in connection with the Cup Trust (the "Publication").

b) The Publication recorded that the FRC had investigated the establishment and operation of the Cup Trust and related tax planning issues, and that the case against the Defendant related to his conduct as a director of the corporate trustee of the Cup Trust during the relevant period.

c) The Publication recorded that "*Mr Mehigan has admitted that his conduct fell significantly short of the standards expected of members of ICAEW and amounted to breaches of ICAEW's Fundamental principles of Objectivity and Professional Competence and Due Care.*"

d) The Publication further recorded that the Defendant had agreed the following terms of settlement: "*Exclusion from the profession for a recommended period of ten years; A fine of £70,000; and A sum of £80,000 to be paid as a contribution to the Executive Counsel's costs.*"

e) In the premises:

(i) The Defendant acted in such a way as to bring the CIOT into disrepute and/or in any way which would harm the reputation or standing of the CIOT (contrary to Rule 1.7 of PRPG 2011); and/or

(ii) The Defendant failed to take due care in his conduct, to take due care in all his professional dealings and/or to uphold the professional standards of the CIOT as set out in the Laws of the CIOT (contrary to Rule 2.6.1 of the PRPG 2011); and/or

(iii) In respect of his actions which were the subject of sanction by the FRC, the Defendant conducted his business relationships improperly, inefficiently, or incompletely to such an extent or on such number of occasions as to be likely to bring discredit to himself, to the CIOT or to members or any part of the membership or to the tax profession (contrary to Rule 2.6.2 of the PRPG 2011); and/or

(iv) The Defendant breached the Laws of the CIOT (contrary to Rule 2.6.2 of the PRPG 2011).

Background:

7. The Defendant was a director (and 50% shareholder as at 23/9/2015) of NT Advisors Limited (O5221472). He was a member of NT Advisors LLP (OC344562), NT Advisors 2009 LLP (OC310972) (formerly known as NT Advisors LLP and Quantum Advisors LLP) and a director of Mountstar (PTC) Ltd, the corporate trustee of the Cup Trust.

8. Between 2005 and 2009 the two LLPs worked in tandem providing clients with details of tax schemes and opinions from Counsel considering the viability of the

schemes. Clients were advised that although each scheme had been declared under the Declaration of Tax Avoidance Schemes (DoTAS), there was a risk the scheme might not succeed and that if it failed, they would be liable to pay tax. The businesses would deal on the client's behalf with all HMRC enquiries regarding the schemes and would finance any resulting litigation. Between 2005 and 2009 the two businesses achieved a turnover of £23.77 million from promoting the schemes.

9. The Cup Trust, a registered UK charity, participated in a tax avoidance scheme utilising Gift Aid relief between January and November 2010.

10. The Defendant indicated that the two LLPs had had no new clients since 2009 when it was decided that no new tax work would be accepted. The LLPs remained active, as they defended in court the tax avoidance schemes they had developed and sold. The limited company had only one client, NT Jersey, based in Jersey.

11. The Financial Reporting Council (FRC) investigated the Cup Trust and a settlement was agreed, published 12 June 2017. The Defendant was excluded from the profession (ICAEW) for a period of 10 years, fined £70,000 and ordered to pay costs of £80,000. The Defendant's solicitors Bird & Bird notified the Taxation Disciplinary Board (TDB) of that investigation by letter of 16 December 2016.

12. The Defendant was notified by the ICAEW on 25 February 2015 that the ICAEW had decided to discipline him. He was sanctioned by the ICAEW for practising without Professional Indemnity Insurance (PII) in June of 2015 but did not advise CIOT that disciplinary action was being taken against him until at the earliest a telephone call in the week commencing the 8th June 2015. The ICAEW had severely reprimanded him, fined him £7,500 and ordered him to pay costs of £10,000 for practising without PII.

13. The Defendant has since taken out retrospective PII and reported that there had been no claims and only one claim threatened.

Conclusions:

14. The Tribunal considered it appropriate to hear the matter under the regulation 15 simplified procedure.

15. The Tribunal considered the evidence and noted that the Defendant had admitted all charges. The Tribunal found that on the basis of the Defendant's admissions and on the basis of evidence contained within the papers supplied:

    i. charge 1 'the PII' charge proved.
    ii. charge 2 'The failure to notify' charge proved.
    iii. Charge 3 'Competence and Care Charge' proved.

Sanction

16. In deciding on the appropriate sanction, the Tribunal considered the guidance contained in the Taxation Disciplinary Board's Indicative Sanctions Guidance of April 2016 and also noted the sanctions imposed in other similar cases, as recorded in Annex B to the Indicative Sanctions Guidance. It also reminded itself that it should start by considering the least severe sanction and only consider more serious sanctions if satisfied that the lesser sanction is not appropriate in this case. It also noted that, '*guideline sanction is guidance only and is not intended to be treated as a tariff. Each case will be judged on its own facts. The guideline may be affected by aggravating and mitigating factors relevant to the allegation(s) and the weight to attach to each, which may increase or decrease the sanction away from the guideline'*.

17. It noted that the purpose of imposing a sanction upon a member, '*is not simply to discipline the individual or firm for any wrongdoing of which he or it may be culpable, but to protect the public and maintain the reputation of the profession by sending a signal as to how serious the Tribunal judges the conduct to be'*.

18. The Defendant had suggested his opinion as to the appropriate level of sanction for his offences based on his interpretation of the sanctions' guidance and historic

cases. The Tribunal noted his comments but determined the sanctions on the approach set out above.

19. The Tribunal noted that the Defendant said that he had received no financial benefit as a result of the breaches and that no client had suffered loss. He stated that he was remorseful and apologised for his errors. He further stated that he had cooperated throughout and would not 'fall foul' of the rules and regulations in future.

20. The Defendant had already been sanctioned for the same facts by other regulators and he was of the opinion that as a result either he should not be sanctioned or should face a lesser sanction. The Tribunal did not consider this prevented it from imposing sanctions in this case. The purpose of the sanction was to protect the public and maintain confidence in the reputation of the tax advisors' profession. The Defendant has admitted bringing the CIOT into disrepute.

The PII charge

21. The Defendant stated that his failure to hold PII was inadvertent. He stated that he had a genuine belief that no PII was required for the work carried out by him. Further, he said that as soon as he was aware of the mistake he put in place retrospective cover for the entire period of the operation for the relevant entities at a cost of £240,000. He argued that this meant that not a single client had been adversely affected.

22. The Tribunal noted from the Defendant's written representations that subsequently, he was unable to obtain further cover on the open market and whilst NT Advisors Ltd and NT Advisors 2009 LLP had been admitted to the ICAEW PII risk pool, membership was no longer available as the maximum membership period had been exceeded. At the time the written submissions were made (19 September 2018) there was no PII cover in place for the businesses. He

stated that the businesses were in '*run-off*' and he would '*wind up both companies in the near future*'.

23. The Tribunal considered the aggravating and mitigating factors. An aggravating factor was the period of time involved, there had been no PII in place for 8 years. It noted that PII had been compulsory for CIOT members in practise since June 1997. Members were required to have a minimum indemnity of £1 million per claim subject to certain exceptions. The Tribunal considered that the Defendant should have been aware of his obligations to have PII cover in place. It noted that the Defendant now stated that it was impossible for him to obtain cover on the open market.

24. The Tribunal did not consider the purchase of retrospective cover to be a mitigating factor. The Defendant was merely putting in place arrangements that should have been in place from the outset. It was the belated cost of ensuring compliance. The Tribunal noted that the Defendant had already been sanctioned by the ICAEW for failing to hold PII but did not consider this a mitigating factor or a reason to lower any sanction imposed.

25. Having considered the evidence, the Tribunal was satisfied that taking no further action, ordering the matter to lie on file, a warning or censure were not appropriate sanctions given the gravity of the charges found proved.

26. The Tribunal noted that in general a suspension is appropriate "*where the conduct is sufficiently serious as to require permanent expulsion, but not so serious as to require permanent expulsion'*. The Tribunal considered that given the time period involved, a suspension would be wholly inadequate to reflect the seriousness of the charge and the failure to protect clients notwithstanding the purchase of retrospective cover. The Defendant had continued to operate his businesses without any cover in place when there was no guarantee that retrospective cover would be available or available at a price he could afford at a future date. It was fortunate that he had been able to purchase such retrospective cover.

27. There was no evidence before the Tribunal that the Defendant had insight into his actions. The Tribunal noted that subsequently he could not obtain cover on

the open market, and the businesses had spent the maximum time in the ICAEW's risk pool. He was in a position where although he was not taking on new clients, he had not yet wound up the businesses even when no PII cover was available.

28. The Tribunal noted that the guideline sanction for 'failure to hold PII' is expulsion. It noted from the Sanctions Guidance that, '*Expulsion is the most serious sanction available. It will be appropriate where this is the only means of protecting the public and/or the conduct is so serious as to undermine confidence in the profession if a lesser sanction were to be imposed'*. The Tribunal noted the suggestion that this was '*an inadvertent mistake'* but did not accept that this excused the defendant's failure. The Tribunal considered that failing to have in place any PII cover for a period of 8 years would undermine the public confidence in the profession notwithstanding that no clients had suffered any loss as a result and that confidence in the profession would be further undermined if a lesser sanction were to be imposed. The only appropriate sanction for such a serious failure was one of expulsion.

Failure to Notify charge

29. The Defendant stated that he was unaware that he was required to notify the CIOT that a decision had been made to discipline him, he believed he was only required to notify the CIOT when the decision was made. He stated that the delay was minimal and not intentional or an attempt to conceal matters from the CIOT.

30. The Tribunal considered aggravating and mitigating factors in relation to this charge. The delay was relatively short, some 4 months and it did not consider this an aggravating factor. However, it did not accept the Defendant's suggestion that a lack of knowledge of the rules should be considered a mitigating factor.

31. Rule 20.10.1 of the Professional Rules and Practice Guidelines of 2011 is clear and free of ambiguity, it states: '*A member must promptly inform the CIOT or the ATT if he:'… is notified of disciplinary and/or regulatory* ***action begun against him*** *by another professional body to which the member belongs or by a regulator;*' [emphasis added].

32. Having considered the evidence, the Tribunal was satisfied that taking no further action, ordering the matter to lie on file or a warning were not appropriate sanctions given the gravity of the charge found proved.

33. The Tribunal noted that the guideline sanction for failure to inform the CIOT of disciplinary action was that of a censure. The Tribunal concluded that the charge was serious but the duration of the delay was relatively short and the Defendant appeared to have notified the CIOT promptly after the decision had been made and on that basis a censure was the appropriate sanction.

Competence and Care Charge

34. The Defendant stated that he cooperated fully with the FRC's investigation and has already faced severe penalties in respect of the same facts that this charge relied on. For the reasons set out above, the Tribunal did not regard this as a mitigating factor.

35. The Tribunal did however regard the fact that this involved his role as a director of a corporate trustee of a charity, as an aggravating factor.

36. The guideline sanction for failure to take Due Care and for acting in such a way as to bring himself, the CIOT or the tax profession into disrepute is censure.

37. Having considered the evidence, the Tribunal was satisfied that taking no further action, ordering the matter to lie on file or a warning were not appropriate sanctions given the gravity of the charge found proved.

38. The Tribunal noted that the guidance states that, '*A censure is appropriate where the conduct is of a serious nature but there are particular circumstances of the case or mitigation advanced which satisfy the Tribunal that there is no continuing risk to the public, and there is evidence of the member's understanding and appreciation of the conduct which has been found proved*.' The Tribunal had no evidence which suggested that the defendant had understanding and appreciation of the conduct which had been found proved. However, on the basis of the charge brought, his conduct did not warrant suspension. The Tribunal were concerned that a censure

would not appropriately reflect the seriousness of the charge, given that it involved a breach of trust.

39. The Tribunal noted that the Tribunal may also consider other sanctions available to it, for example a fine in addition to another sanction. It determined that an additional fine of £5,000 would indicate the seriousness with which it viewed the conduct of the Defendant.

Costs

40. The Tribunal had regard to the Guidance on Awarding Costs. It noted that its power to award costs was set out in Regulation 20.6 (f) in dealing with a Defendant against whom a charge has been proved. The presumption that an unsuccessful defendant should pay costs was based on the principle that the majority of professional members should not subsidise the minority who, through their own failing, have brought upon themselves disciplinary proceedings. The power to award costs was discretionary. The general principle required exceptional circumstances for a Tribunal not to award costs against an unsuccessful defendant.

41. The Defendant submitted that he had cooperated fully with the investigation and admitted all charges against him and that he had not required an oral hearing. He suggested this should be reflected in any costs order.

42. The Tribunal considered the schedule and considered that the costs outlined were proportionately and reasonably incurred.

43. The Tribunal noted that the costs claimed reflected that the Defendant had not required an oral hearing. There were no exceptional circumstances put forward to persuade the Tribunal not to award the costs in full and, in the circumstances, it did not reduce the costs below the level incurred by the TDB.

44. The Tribunal ordered that the costs in these proceedings in the sum of £6,044.06 be paid by the Defendant.

Publication

45. The Defendant had not made any application with regard to publication.

46. The Tribunal noted the contents of the Guidance for Disciplinary Panel Members on the publication of disciplinary and appeal findings and Regulation 28.

47. It noted the general principle that any disciplinary finding made against a member would be published and the member named in the publication of the finding. The purpose of publishing such a decision was not to add further punishment for the member. It was to provide reassurance that the public interest was being protected and that where a complaint was made against a member of one of the professional bodies covered by the Taxation Disciplinary Scheme, there were defined, transparent procedures for examining the complaint in a professional manner and for imposing a sanction upon a member against whom a disciplinary charge had been proved.

48. The Tribunal further noted that under Regulation 28.3, it had a discretion to order that the name of the member or the details of orders made against them should not be published. The Tribunal did not find any circumstances, let alone any wholly exceptional circumstances, which would justify an absence of publicity.

49. The Tribunal ordered that, in accordance with Regulations 28.1, this order and these findings should be published as soon as practical referring to the Defendant by name. The finding would remain on the Board's website for a period of 3 years in accordance with the Publication of Disciplinary and Appeal Findings policy dated July 2009.

Linda Lee
Chair

Dated: October 2018