

DISCIPLINARY COMMITTEE - RECORD OF DECISION

Mr Kenneth Wilson Pattullo, a Member of the Insolvency Practitioners Association.

A tribunal of the Disciplinary Committee made the decision recorded below having heard a formal complaint on Tuesday 6 December 2016. This Record of Decision has been approved by the Tribunal in accordance with Disciplinary Committee Rule 45 and will be published.

Terms of the Formal Complaint

1. That between March 2006 and October 2014 Kenneth Wilson Pattullo acting as Trustee of a Protected Trust deed failed to:
 - a. progress the Trust Deed in a timely manner in that distribution to creditors was subject of unreasonable delay; and
 - b. ensure that an inhibition was in place at all times

in breach of the Fundamental Principle of Professional Competence and Due Care

Hearing date

06 December 2016

Previous hearing

date(s) 29 June
2016

Pre-hearing review or final hearing Final

Hearing Complaint found proved

All heads of complaint proven Yes

Order: Order to pay costs of £15,845.

Procedural matters and findings:

Parties present

The IPA Investigation Committee was represented by Tracey Owen of Counsel.

The Respondent did not appear and was not represented.

Hearing in public or private

The hearing was held in public

Decision to proceed in the absence of the Respondent

The Legal Assessor reminded the Tribunal that it must first consider whether service of notice had been properly effected in accordance with Rule 9 of the IPA Disciplinary Committee Rules ("the Rules"). If so, then its discretion to proceed in the absence of the

Respondent under Rule 25 was one that must be exercised with the utmost caution and with the overall fairness of the proceedings at the forefront of its mind.

The Tribunal was satisfied that the notice of the hearing had been served. In terms of the discretion to proceed in absence under Rule 25, the Tribunal had sight of a Form 10 signed by Respondent and dated 2 December 2016, in which he confirmed that he did not intend to be present at the hearing and or to be represented in his absence. The Tribunal noted the Respondent had put forward written submissions in mitigation, which it would consider with care.

In all the circumstances, the Tribunal was satisfied it was appropriate and fair to proceed with the hearing in the Respondent's absence.

The disciplinary hearing of 6 December 2016

The Tribunal was informed that the Formal Complaint in relation to the Respondent had been the subject of a previous hearing before a differently constituted tribunal of the Disciplinary Committee on 29 June 2016 and had then been the subject of a successful appeal. For the avoidance of doubt, the present Tribunal confirmed:

- this was a new Tribunal composed of members who had not previously considered the case;
- this Tribunal had not been made aware of the sentence imposed at the previous disciplinary hearing and had not been informed of the grounds of the subsequent appeal
- it understood that its task at the hearing on 6 December 2016 was to consider only the issue of sanction and order afresh.

Documents considered by the Tribunal

The Tribunal considered the documents contained in the Investigation Committee's bundle and a document entitled "Chronology relating to delay" submitted on behalf of the IPA, together with the Form 10 submitted by the Respondent dated 2 December 2016 and his written submission in mitigation.

The Tribunal also had sight of a letter from IPA to the Respondent of 30 November 2016 enclosing a schedule of the costs for which the IPA intended to apply.

Background facts

Ms Owen set out the background facts according to the Formal Complaint which were accepted by the Respondent:

1. The Respondent was admitted as a member of the IPA on 16th July **1993** and practises at Begbies Traynor in Glasgow.
2. The matter concerned a complaint made by AN. On 14 March 2006, AN signed a Trust Deed with the Respondent as Trustee. It became a Protected Trust Deed shortly thereafter. The original intended duration of the Trust Deed was three years and AN's total liabilities amounted to £89,841. His main asset was his home in Edinburgh, which was valued at £165,000.
3. AN owned the property jointly with his wife although less than five years previously he had passed to her a half share of the equity for no consideration. There was an issue as to whether this amounted to gratuitous alienation. AN agreed to pay for the full value of the equity which was approximately £90,700 and raised a loan with his

wife and paid £59,916 into the Trust Deed on 30 October 2007. This left approximately £34,454 outstanding.

4. On 23 March 2009 AN asked the Respondent whether it would be possible to extend the Trust Deed. On 4 August 2009 the Respondent agreed to extend the Deed by one year. On 15 December 2010 the Respondent agreed to accept £15,000 as the final equity payment. A payment of £3,000 was made into the Trust Deed on 3 January 2011, but that was the last and only payment until the debtor was discharged on 4 November 2014.
5. Throughout early 2011 the Respondent corresponded with AN about the sale of items to raise the balance. His letter dated 17 May 2011 asked for AN's written proposals for payment. This letter was sent five years and two months after the Deed was signed. Nonetheless, when no payment was made no action was taken in the second half of 2011.
6. AN had engaged solicitors and a business recovery specialist in 2012. There was a series of letters between the parties around PPI compensation, sale of wine and decanters and threatened court action in 2012 and 2013. It was claimed on behalf of AN that at the time of the transfer of half the equity to AN's wife, AN was in fact solvent and as such the issue of whether it was a gratuitous alienation did not arise.
7. In email correspondence in August 2012 the Respondent's solicitor asked AN's representative to provide evidence of AN's solvency in 2005. In response AN's representatives said that he would prefer to go to court.
8. On 12 November 2012 the Respondent's solicitors informed AN's representative that the Trustee wished to issue court proceedings 'if proof of AN's solvency was not produced within seven days.' This threat was made six years and ten months after the Trust Deed had been signed. No proceedings were issued and creditors were not consulted by the Respondent.
9. The correspondence between the Respondent's solicitors and AN's Representative continued. On 21 February 2013 AN made an offer to creditors that he would pay them 40p in the pound. However, it took until 5 April 2013 for the Respondent's solicitors to point out to AN's Representative that the offer of composition was invalid and to give a 'final opportunity' to pay the outstanding £12,000. However, creditors were not consulted and again no action was actually taken.
10. Counsel was instructed on behalf of the Respondent to advise on whether there had been a gratuitous alienation to AN's wife in 2005; whether AN had a defence and possible difficulties with raising a court action in the seventh year of the Trust Deed. Counsel provided a written opinion on 27 May 2013. In summary the view was that although a valid claim could be made it was likely to be less than productive given that the transfer in question had taken place eight and a half years ago. Further, there was potential for argument that the claim could be time barred and the Trustee's actions over the previous eight years would be scrutinised by the court. No action was taken in the light of Counsel's advice, nor were the creditors consulted.
11. By May 2013 AN was frustrated by the lack of progress on his Trust Deed and in particular his perception that money was being taken from his estate in fees incurred by the Trustee. In May 2013 he made his complaint to IPA. Between September and December 2013 The Respondent's solicitors sought AN's consent to sale of the Edinburgh property. AN and his wife had separated. By December 2013 AN was living on his own in the property.

12. On 24 February 2014 the Respondent and his solicitors met and agreed that 'it was not cost effective to pursue legal action'. This meeting took place nine months after Counsel had advised and seven years and eleven months after the Trust Deed had been signed.
13. It appeared from the documents that on 29 May 2014 in response to a request by AN for an update on his complaint, the Regulation Officer informed him that the decision had been taken to discontinue legal action against him.
14. This decision was reported to creditors in a letter dated 2 June 2014. The Respondent also explained that AN had asked the Accountant in Bankruptcy ('AIB') to audit his files leading to further delay in distribution of funds.
15. The AIB issued her determination for the period 14th March 2006 to 15th January 2014 on 3 June 2014, setting the Respondent's remuneration at £28,584 which represented a reduction of £13,438. The Respondent did not appeal to the Sheriff but raised queries with the AIB which did not result in any change to the determination and were not resolved until September 2014.
16. On 13 August 2014 AN again made enquires about progress and was told there had been an issue with registration in connection with lifting the inhibition and apologies were offered for any inconvenience. It took until 21 October 2014 and further intervention by IPA, for the Respondent's Manager to inform the IPA Regulation Officer that the inhibition on the Edinburgh property had been lifted, that the final dividend cheques would be issued to creditors that day and the date for the final meeting of creditors had been proposed for 4 November.
17. The meeting was held on 4 November 2014 and the Respondent and AN were discharged. The final distribution to creditors took place eight years and ten months after the Trust Deed was signed.
18. An Inhibition - or Letters of Inhibition - is recorded not against the property, but against an individual in the Register of Inhibitions and Adjudications and attaches itself to all property in Scotland. This means when a debtor goes to sell or tries to remortgage his property, all solicitors must check the register to give clear title to the property to the person buying it. It depends on the solicitor involved to make the check. In accordance with paragraph 2(1) of Schedule 5 of the Bankruptcy (Scotland) Act 1985 it is the responsibility of the Trustee to register the inhibition which lasts for five years. An inhibition prevents the sale or remortgaging of a debtor's property without the agreement of the Trustee.
19. The Respondent registered the Inhibition for AN on 21 April 2006. Therefore it would have lapsed on 21 April 2011. The failure to renew apparently came to light in July 2012, when the Respondent's solicitor understood that the sheriff officers had registered the inhibition. They had not and in fact they required the inhibition to be served again. This failure was the subject of an email exchange between the Respondent's solicitor and AN's representative in early September 2012 and a fresh inhibition was registered on 13 September 2012. Accordingly there was a period of seventeen months when there was no inhibition in place.

Determination

20. The present Tribunal was not required to re-consider the findings in relation to the facts and professional misconduct which had been found proved by the previous Disciplinary Tribunal at the hearing of 29 June 2016. The present Tribunal however

noted that the Respondent had again confirmed his admissions to the complaint in the Form 10 dated 2 December 2016.

Submissions on Sanction

21. Ms Owen confirmed there was no previous history to be considered in respect of the Respondent.
22. The Tribunal carefully considered the Respondent's written submissions mitigation:

Sub head of complaint (a)

- There was a consistent engagement with this case. The fact that the Respondent held funds but did not make an interim distribution can be explained by the uncertainty that he faced with regard to recovering the balance of the equity due to the estate. After-the-event insurance was sought to protect the assets available to the creditors but it was not clear that this would ultimately be available and, as a result, the Respondent had to maintain sufficient funds (which, in the face of litigation can, of course, be very uncertain) to ensure that he had the ability to pursue the relevant claims.
- The Respondent relied upon both a Senior Manager (now a partner in the business) and a very experienced Manager to administer the case. He was entitled to do so, although, at all relevant times, he remained closely involved. The Debtor in this case was particularly troublesome and the many complaints to a variety of bodies and obstacles which he placed in the way of the progress of the case have exacerbated any delay which there might have been in being able to distribute funds.
- During the latter stages of the case, there were competing requirements from: firstly, the Accountant in Bankruptcy who insisted on the files being sent to her to deal with both a complaint by the Debtor and an audit requested by the Debtor; secondly, from the Financial Services Ombudsman (as it then was) in respect of a complaint by the Debtor; thirdly, the actual administration of the case and the payment of a dividend to the creditors and, fourthly, the IPA in respect of this complaint,
- The final creditor claim and the final realisation (of a PPI claim) were only received just before the distribution was finally made., If there had not been the other demands (as detailed above) upon the time of the staff dealing with this case, which were largely caused by the multitude of complaints submitted by the debtor, this process could have been progressed more quickly

Sub head of complaint (b)

- In relation to the inhibition there was no risk to the creditors for various reasons.
 - Firstly, the Debtor was clearly not co-operating in respect of several matters and this entitled the Respondent to sequester the Debtor at any time. Sequestration has the effect of an inhibition and so any attempt to deal with the property by the Debtor would have then, of course, have been struck down.
 - Secondly, when the Respondent became aware of the failure to renew the inhibition (which arose as a result of human error and not

a system failure), he instructed solicitors to deal with the matter, as he was required to do, but they took some nine months to deal with the matter.

- Finally, the Respondent's systems are robust in ensuring that inhibitions are dealt with timeously but, on this one occasion, a coincidence of human errors led to the failure. This is very much to be regretted but human error on this scale is both unusual and hard to guard against. The oversight was a one-off and, as explained, had absolutely no adverse effect on the position of the creditors.

Determination on Sanction

23. The Tribunal proceeded in accordance with Rules 36 to 38 of the Rules. It carefully considered all the submissions, written and oral, and accepted the advice of the Legal Assessor in relation to the sanction stage. It carefully considered the Respondent's submissions in mitigation and made reference to the Common Sanctions Guidance.
24. The Tribunal was mindful that the purpose of any sanction was to protect the public, to maintain standards and to maintain confidence on the profession. Its attention had been drawn to the authority in the *Bolton v Law Society* of 1994. The Tribunal was mindful that a sanction was not intended to be punitive, though that may be its effect. It adopted a proportionate approach in considering sanction and considered the options in ascending order of seriousness.
25. The Tribunal took into account, in relation to part (a) of the complaint, the length of the delays involved and the circumstances in which they arose. There was a delay in progressing the administration of the insolvency. The Tribunal concluded that the Respondent had failed to retain control of the matter and there had been a failure on his part adequately to supervise and guide the insolvency administrator who conducted the day to day administration.
26. In relation to part (b) of the complaint, this had been a further oversight on the part of the Respondent which resulted in the interests of creditors not being protected while the inhibition was not in place and again reflected his failure to properly oversee the case. The matters taken as a whole represented a serious failing by the Respondent to fulfil his professional responsibilities.
27. Having considered all the circumstances, and given careful attention to the mitigation submitted by the Respondent, the Tribunal was of the view that a sanction was necessary in the public interest and it would be inappropriate to take no action. It was mindful that the Respondent had long history of membership of the IPA and had no prior adverse disciplinary history.
28. In all the circumstances, and taking account of the Common Sanctions Guidance, the Tribunal determined that a Reprimand should be imposed and that the Respondent should pay a fine of £5,000.

Costs

29. The Tribunal carefully considered the position in relation to costs. It considered the schedule of the IPA's costs which had been sent to the Respondent in advance of the hearing. The Respondent had not completed and returned the IPA Questionnaire seeking information about his financial circumstances.

30. The Tribunal considered the written Respondent's submissions in relation to costs contained in his mitigation document. It took account of his submission that the amount of costs claimed on behalf of the Investigating Committee seemed high to him and that he felt the involvement of the debtor might account for this. He pointed out that the IPA's investigation was not synonymous with representing the individual who raised the complaint. He further noted that a number of issues raised by the Debtor had not been "upheld" by the Investigation Committee.
31. The Tribunal enquired and was informed that in relation to the costs prior to the decision of the Investigating Committee, which related to investigation of all the complaints submitted, a discount of some 50% had been made by the IPA to take account of those aspects of the complaint which the Investigating Committee had not referred.
32. In the light of this, the Tribunal was satisfied the costs claimed by the IPA were appropriate and reasonable and ordered the Respondent to pay the costs in the sum claimed, £15,845.00.



CHAIRMAN OF THE TRIBUNAL

Philip Long
6/12/16

