

## DISCIPLINARY COMMITTEE - RECORD OF DECISION

**Mr Ian Pankhurst, a former Member of the Insolvency Practitioners Association.**

**A Tribunal of the Disciplinary Committee made the decision recorded below having heard two Formal Complaints on Thursday 16 February 2017. 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 Complaints:**

#### **Complaint F1.**

That according to Articles 22A and 66 of the Articles of Association the former Member is liable to disciplinary action in that when he was a Member of the Association he committed acts or defaults likely to bring discredit, namely:

1(a) Having ceased on 22 August 2012 to be administrator of a company, on or around 28 March 2013 transferred from that company's account approximately £98,341 to the office account of his former practice and failed to progress determination of his administrator's fees which had been capped, only coming to a resolution around March 2016;

and

(b) Failed to ensure that correspondence between 30 June 2014 and 5 January 2015 from solicitors acting on behalf of the liquidator received a response.

2(a) On or about 28 March 2013, withdrew £12,500 from an estate in administration for personal use and without proper authority;

(b) On or about 18 April 2013 withdrew the sum of £85,841 from an estate in administration for personal use and without the proper authority;

(c) Between July 2013 and dates unknown on and after April 2014, withdrew in total £27,000 from an IVA estate for personal use and without the proper authority;

(d) Between January and May 2015, withdrew in total £30,000 from an IVA estate for personal use and without the proper authority

in breach of the Fundamental Principle of Integrity.

#### **Complaint F2**

That according to Articles 22A and 66 of the Articles of Association the former Member is liable to disciplinary action in that when he was a Member of the Association he committed acts or defaults likely to bring discredit, namely:

That he failed to take proper steps to verify the validity of a debenture prior to appointment on 5 December 2014 and before distribution to the debenture holder

*Or in the alternative*

Between 1 October 2014 and 5 December 2014 failed to take proper steps to record legal advice on verification of a debenture prior to appointment and before distribution to the debenture holder

in breach of the Fundamental Principle of Professional competence and due care.

**Hearing date:** 16 February 2017

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

**Hearing Complaint found proved:** Yes

**Heads of complaint proven:** F1: 1(a), 2 (a) and (b) proved, (c) proved in part and (d) proved in part. F2: Proved (in the second alternative).

**Order:** Order to pay costs: In respect of F1: £9,000. In respect of F2: £3,500.

**Procedural matters and findings:**

**Parties present**

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

The Respondent did not appear and was not represented.

**Hearing in public or private**

The hearing was held in public other than when the Tribunal went into private session for a short period.

**Decision to proceed in the absence of the Respondent**

Ms Owen on behalf of the IPA Investigation Committee made an application to proceed in the absence of the Respondent under Rule 25 of the IPA Disciplinary Committee Rules (6 November 2014) ("the Rules").

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 Rules. If so, it must next consider its discretion to proceed in the absence of the Respondent under Rule 25, which must be exercised with the utmost caution and with the overall fairness of the proceedings at the forefront of its mind. The Tribunal's attention was drawn to the guidance in the case of *R v Jones (Anthony) [2003] 1 AC 1HL*. The Tribunal accepted the advice of the Legal Assessor.

The Tribunal was satisfied that the Notice of the hearing dated 4 January 2017 had been properly served in accordance with Rules 9 and 17.

The Tribunal noted an e mail dated 26 January 2017 from the Respondent to the IPA and letters dated 3 February 2017 and 15 February 2017 from Neil Davies and Partners, solicitors instructed on his behalf. These confirmed that the Respondent had received the notice of the hearing dated

4 January 2017, was aware of the hearing date of 16 February 2017 and did not intend to attend the hearing or be represented, citing his inability to fund the cost of legal representation at the hearing.

In terms of its discretion to proceed in absence under Rule 25, the Tribunal noted the Respondent's stated intention not to attend or be represented. It noted that an adjournment of the hearing had not been requested and further, the correspondence suggested an expectation that the hearing would proceed, as written submissions had been sent on behalf of the Respondent.

The Tribunal concluded that the Respondent had voluntarily absented himself from the proceedings and waived his right to be present. It was also mindful of the general public interest in regulatory proceedings involving insolvency practitioners being resolved with reasonable expedition. The Tribunal determined to take full account of the written submissions received from the Respondent and was satisfied it could ensure that the hearing process was conducted fairly in the Respondent's absence.

Accordingly the Tribunal resolved to proceed with the hearing in the Respondent's absence.

#### **Documents considered by the Tribunal**

The Tribunal considered the following documents:

Notice of Hearing dated 4 January 2017, and the documents contained in the Investigation Committee's bundle (pages 1-120);

On behalf of the Respondent, an e mail dated 26 January 2017 and letters (with enclosures) dated 3 and 15 February 2017 from Neil Davies and Partners.

Additional pages 59 (a) – (d) of the hearing bundle received during the hearing

#### **Background facts**

1. Ms Owen set out the background facts relating to the Formal Complaint and as set out in the summary in the hearing bundle.
2. The Respondent Ian Pankhurst is a former member of the IPA. His membership ceased on 15 April 2016, following the withdrawal of his Licence to Practise by the IPA Membership & Authorisations Committee. On this date, the complaints which form the subject of the current allegations were outstanding. These matters were considered by the IPA Investigation Committee and referred to the Disciplinary Tribunal on 15 November 2016.

#### **Formal Complaint F1 – allegations 1(a) – (d).**

3. The complaint was submitted by Mr NN, one of the Joint Liquidators of a company, FMH Ltd.
4. The Respondent with his partner, the late JB, had been appointed as Administrators of FMH Ltd on 22 August 2011. The strategy was to realise the business and assets of FMH Ltd. The Final Progress Report was dated 1st August 2012. The Administrator's fees had been capped at £50,000. FMH Ltd was wound up and the Liquidators appointed on 4 December 2012.
5. The balance in hand as at 22 August 2012 was £97,334 and was retained by the Respondent. The Respondent's costs were estimated at £364,213.

6. During the period from November 2013 to April 2014, MB, the solicitors for the complainant, sought to engage with the Respondent. On 6 June 2014, he replied stating that he would instruct his solicitors to make the necessary application to the Court to determine the level of his fees. No such application had been made by June 2014.
7. On 18 June 2014, MB wrote to the Respondent advising that they were aware that the sum of £98,341 had been transferred from the account of FMH Ltd. to the account of SR(2009) (the Respondent's practice) on 28 March 2014. The level of his fees as Administrator had not yet been resolved at this time.
8. ND & P, solicitors instructed on behalf of the Respondent, wrote to MB on behalf of the Respondent on 27 June 2014 suggesting that it held the sum to the joint order of MB and ND & P pending an application to the Court being made by another firm of solicitors on behalf of the Respondent, WP, to resolve the fee issue. Subsequently, the sums of £50,000 and £48,341 were transferred to ND & P on 30 October and 3 November 2014 respectively.
9. Mr NN, the appointed Liquidator of FMH Ltd., submitted a complaint to the IPA on 2 April 2015.
10. On 19 May 2015, WP, solicitors on behalf of the Respondent, wrote to MB pointing out that the amount of the Administrator's fees due was far in excess of the outstanding balance held and questioning the justification in taking up the Court's time in deciding an application. In response on 26 May 2015, MB replied pointing out that the sum had in fact been transferred to the account of SR(2009) on 28 March 2013 and they sought an audit trail, together with a breakdown of the Administrator's claim for costs.
11. On 19 June 2015, the Respondent wrote to the IPA stating that the sum had been transferred to an account of SR(2009) "*to safeguard the company funds once I had left/ vacated office*" and reiterated that he was entitled to a far greater sum in fees, although no application to the Court had yet been made. He also said he was submitting with his letter an e mail from ND&P confirming that it was holding the sum of £98,341 to his (the Respondent's) order.
12. In relation to the period in excess of three years which had passed, in response to enquiries from the IPA Regulation Officer during the IPA's investigation, the Respondent stated in a letter dated 10 September 2015 that the hiatus in correspondence was due to an oversight on his part. He pointed out that he only took over the matter upon the death of his partner JB in December 2013. He said he had reached agreement with the complainant to write off £250,000 of his fees.
13. On 3 November 2015 the IPA sought documentary evidence from the Respondent of the date when the monies had been transferred to ND&P solicitors and confirmation that the funds had been available at all times in the firm's client account. In the absence of a response, the IPA's request was repeated.
14. Subsequently, on 24 November 2015, the Respondent wrote to the Chairman of the IPA Investigation Committee disclosing that amounts had been withdrawn from the sum held in SR(2009)'s client account as fees, without authority.
15. The sums withdrawn from the estate of FMH Ltd without proper authority were, as alleged in head 2(a) and 2(b) of the allegations, £12,500 on around 28 March 2013 and £84,841 on around 18 April 2013.
16. Finally, in March 2016, the creditors' committee in the liquidation confirmed the Respondent's further remuneration in the sum of £60,000.

17. Heads 2(c) and (d) related to other unauthorized withdrawals of funds from two IVA estates, of Mr NC and Ms SB respectively. These matters had been identified during case reviews conducted as part of a targeted inspection visit by the IPA at the Respondent's practice on 5-7 January 2016 and were confirmed in a report of the visit dated 8 January 2016 and admitted through the respondent's solicitors.

### **Formal Complaint F2**

18. The complaint was made in April 2015 by NC, a creditor of a company, F Ltd.
19. The Respondent had been appointed as the Administrator of the company on 5 December 2014 by a debenture holder, H Ltd., which had agreed on 1 October 2014 to factor F Ltd's book debt ledger. In return, H Ltd. had been granted a debenture conferring fixed and floating charges over the company's debtor ledger and remaining assets. A "pre-pack" sale of the company's assets to H Ltd. was completed on the day of the Respondents appointment.
20. The Investigation Committee, in considering NC's complaint, directed that enquiries be made as to the steps taken by the Respondent to obtain formal advice on the validity of the debenture. A letter was sent by the IPA on behalf of the Investigation Committee to the Respondent, dated 1 December 2015, requesting, amongst other matters, "*a copy of the legal advice you took on the validity of the debenture and factoring agreement in favor of [H Ltd].*"
21. In response, the Respondent, in a letter dated 22 December 2015, said whilst he had discussed the charge with his solicitors at the time of his appointment, he did not formally instruct them to provide written advice on the validity of the security. He accepted that he should have obtained written advice. He provided a letter of advice from HCB Group Solicitors dated 21 December 2015 confirming the validity of the debenture. The solicitors' letter did not refer to having been consulted about the matter by the Respondent previously, either contemporaneously with his appointment or prior to it.
22. In his response to the Investigation Committee of 20 April 2016, the Respondent admitted his oversight in not having asked his solicitors formally to verify the validity of the security.
23. Shortly in advance of the hearing, in a letter dated 3 February 2017, ND & P submitted an email from HCB Group Solicitors dated 30 January 2017. This stated, in summary, that they had been instructed by the Respondent on 17 November 2014, prior to the Respondent's appointment as Administrator, and had been sent documents including the debenture in unsigned word format. The solicitor stated that although not formally instructed to advise on the validity of the debenture, he had reviewed it. He stated that had he considered there to be any risk that the debenture was invalid he would have brought it to the attention of the Respondent prior to the sale and the Respondent's appointment on 5 December 2014.

### **Submissions of the parties**

#### **Complaint F1**

24. Ms Owen, on behalf of the Investigation Committee, submitted that it was evident from the correspondence that the Respondent accepted the underlying facts in the Formal Complaint.
25. In relation to the first two payments taken without proper authority, the Respondent had said they were justifiable as they were drawn as fees and he was confident that the court would decide that he was entitled to a higher sum for his unpaid fees for the administration than the capped figure of £50,000. However, Ms Owen submitted that the Respondent's remuneration

had not at that time been approved. All the sums in F1 had been removed without proper authority. Such of the mitigating circumstances and explanations as were apparent from the correspondence were matters that should properly be taken into account by the Tribunal at the sanctions stage, if reached.

26. Ms Owen submitted that the taking of substantial sums for personal use and without proper authority constituted breaches of the Fundamental Principle of Integrity and meant the Respondent was liable to disciplinary action.
27. In his submissions, the Respondent accepted in respect of 1(a) that he transferred the sum of £98,341.20 from the estate account of FMH Ltd. in two tranches: £50,000 on 30 October 2014 and £48,341.20 on 3 November 2014. He stated that the transfer to an account of his practice was to safeguard the fees due to him once he had vacated office as Administrator. The Respondent further confirmed that these sums were not available at all times, but were subsequently applied by him for compelling and confidential reasons (details of which the Tribunal determined to receive in private session). The Respondent further submitted the sums were repaid by him and there was no loss to the insolvent estate of the company. He stated the sums were withdrawn by him in exceptional circumstances and that he bitterly regrets withdrawing the sums without authorisation.
28. In relation to 1(b), the Respondent accepted there was some delay in resolving the matter, but stated that some correspondence was exchanged with MB in the period concerned. He also stated it had been open to MB to progress the issue on behalf of the Liquidator.

## **Complaint F2**

29. Ms Owen submitted that the Respondent's failure to take steps, or record any such steps to check the validity of the debenture prior to the appointment was a serious matter. There was no formal consultation and advice prior to appointment and distribution of funds to the debenture holder, which was not a bank but a competitor. Ms Owen submitted that in these circumstances the Respondent was liable to disciplinary action.
30. The Respondent accepted he had not formally instructed solicitors to advise on the validity of the debenture at the relevant time. His solicitors ND & P had submitted the e mail from HCB Group Solicitors of 30 January 2017 (referred to at paragraph 23, above) confirming that they had been provided with and reviewed the debenture prior to the Respondent's appointment, although not formally instructed to advise upon it.
31. The Respondent acknowledged he did not record any legal advice and should have done so.

## **Determination**

32. The Tribunal gave careful consideration to all the documents and submissions presented in the course of the hearing, including the written submissions and evidence submitted on behalf of the Respondent shortly before the hearing. It accepted the advice of the Legal Assessor. It was mindful that the burden of proving the allegations rested upon the IPA Investigation Committee throughout and that the standard of proof to be applied in relation to the facts is the civil standard, the balance of probabilities. In relation to findings of misconduct, the Tribunal was mindful that not every action or omission amounts to misconduct, and to make such a finding, the issues in question must be serious and represent a falling far short of the standards expected.

**Complaint F1, 1(a) – found proved.**

33. The Respondent has accepted the facts, in that he transferred the sum of £98,341.20 from the estate account of FMH Ltd. to his own practice account. The Tribunal noted his explanations, relating to his wish to safeguard the fees due to him. However, the transfer from the estate account was unauthorized and the funds which were being held on trust for the estate were potentially put at risk once moved to the Respondent's practice account. He did then fail to progress the resolution of the fee issue until March 2016, a period of some three years, which in the Tribunal's view was unacceptable.

**Complaint F1, 1(b) – found not proved.**

34. The Respondent has acknowledged there was some delay on his part in the six month period referred to between 30 June 2014 and 5 January 2015. The Tribunal notes this, but takes the view that this aspect does not reach the threshold of seriousness to justify a finding of misconduct.

**Complaint F1, 2(a) and (b) found proved, (c) and (d) proved in part.**

35. The Tribunal noted the admissions of the Respondent in respect of the sums withdrawn without authority in respect of the estates of FMH Ltd, Mr NC and Ms SB. In respect of Mr NC, in head 2(c), the Tribunal noted the Respondent's admission was in the sum of £16,165 and found the particular proved only to that extent. In respect of Ms SB, in head 2(d), the Tribunal noted the Respondent's admission was in the sum of £24,425 and found the particular proved only to that extent.
36. The Tribunal noted the confidential and compelling circumstances which it determined to consider in mitigation at the sanction stage of the hearing. However the Tribunal was in no doubt that the Respondent's conduct in this matter constituted a serious breach of his professional obligations and amounted to a lack of integrity and to professional misconduct.

**Liability to disciplinary action**

37. The Tribunal was satisfied that the facts found proved in F1 1(a) and 2 (a) to (d) indicated that the Respondent's conduct was in breach of the Fundamental Principle of Integrity as alleged and amounted to misconduct. It was satisfied that the Respondent was liable to disciplinary action in respect of these matters.

**Complaint F2 – found proved in the second alternative**

38. In relation to complaint F2, the allegation was in the alternative. The Tribunal noted that the Respondent admitted that he should have obtained written advice on the validity of the debenture and had not done so. He stated however that he had discussed the matter with his solicitors at the time and had now submitted evidence from the relevant solicitor which confirmed this. The Tribunal found that his failing was in not obtaining advice in writing at the time, or noting advice received orally, which the Respondent accepted he should have done. The Tribunal therefore found the second of the alternative heads of the allegation was proved.

**Liability to disciplinary action**

39. In relation to the facts found proved in F2, the Tribunal was satisfied that the Respondent's actions were in breach of the Fundamental Principle of Professional competence and due care. The Tribunal was satisfied that the Respondent was liable to disciplinary action in respect of these matters.

### **Submissions on Sanction**

40. Ms Owen confirmed there was one matter relating to previous history to be considered in respect of the Respondent. This concerned a Reprimand imposed under a Consent Order by the Investigations Committee on 29 October 2013 and concerned a breach of the Fundamental Principle of Professional competence and due care by drawing remuneration in excess of the amount to which the Respondent was entitled as a result of a clerical error, the amount in question having been immediately refunded .
41. The Tribunal considered carefully the representations submitted on behalf of the Respondent in mitigation. These included a confidential submission which the Tribunal had received and considered in private session.

### **Determination on Sanction**

42. 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 all the Respondent's submissions in mitigation and referred to the Common Sanctions Guidance.
43. 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 and its regulation. The Tribunal was aware 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 available sanctions in ascending order of seriousness.
44. Having considered all the circumstances, the Tribunal was of the view that sanctions were necessary in the public interest and it would be inappropriate to take no action.
45. The Tribunal was mindful that the Respondent's licence had been withdrawn and he had been excluded from membership following the earlier decision of the IPA Membership and Authorisation Committee in April 2016 and to that extent, further equivalent orders it might make would be of no additional effect. However, the Tribunal considered it appropriate to indicate the sanction orders it would otherwise have applied in order to mark the gravity of the matter and recognise the public interest.
46. In respect of the matters found proved in respect of Complaint F1, the Tribunal determined that it would have withdrawn the Respondent's licence and excluded him from membership of the IPA. It did not consider that a financial order was necessary in the circumstances.
47. In respect of the matter found proved in respect of Complaint F2, the Tribunal determined that it would have imposed a Reprimand on the Respondent.

### **Costs**

48. The Tribunal considered the position in relation to costs sought by the IPA Investigation Committee. It considered the schedule of costs which had been sent to the Respondent in advance of the hearing, the sums claimed (following an amendment sought by IPA Investigation Committee to reduce the total sum by £300) being £10,062.50 in respect of Complaint F1 and £5,912.50 in respect of Complaint F2.
49. The Respondent had provided information about his financial circumstances of which the Tribunal took account. It was mindful of the Respondent's current difficult personal



circumstances and impecunious position. It was also aware that he is currently making payment of an earlier costs order imposed by the IPA Membership and Authorisation Committee. In view of the above circumstances and given that not all the charges were found proved, the Tribunal determined that the Respondent should pay part of the IPA Investigation Committee's costs, namely the sum of £9,000 in respect of Complaint F1 and £3,500 in respect of Complaint F2, in total £12,500.

A handwritten signature in blue ink, appearing to read "R. W. Shong". The signature is written in a cursive style with a horizontal line under the name.

CHAIRMAN OF THE TRIBUNAL

7 March 2017