



DISCIPLINARY ORDERS AND REGULATORY DECISIONS

Date published – 5 October 2011

Contents	Page
Disciplinary orders	
Disciplinary Committee tribunal orders	
1	George Douglas Gray [ACA] 2-3
2	John Mitchell Johnstone ACA 4-6
3	Jasani & Co 7-11
4	Timothy Higginson [FCA] 12-15
5	Kiran Shah [ACA] 16-21
6	Henry Mark Brownson FCA 22-32
Cessation of Membership	
7	List of members who have been ceased from membership 33
Investigation Committee consent orders	
8	HMN Accountants Ltd 33
9	Mohammed Hashim 33
10	H W Chartered Accountants 33
11	C H Ivens & Co 34
12	David Martin Reeve 34
Regulatory orders	
Audit Registration Committee regulatory penalties/withdrawals	
13	Keith, Vaudrey & Co 35
14	Marshall & Co 35
15	Gutteridge Scanlan 35
16	KPMG LLP 35
17	M Emanuel 35
18	YPO, Chartered Accountants 35

Disciplinary orders

Disciplinary Committee tribunal orders

1 **George Douglas Gray [ACA]** of 17 Pattison Road, London, NW2 2HL

The tribunal of the Disciplinary Committee made the decision recorded below having heard a formal complaint on 7 June 2011

Terms of complaint

Is liable to disciplinary action under Disciplinary Bye-law 4(1)(a), namely:

...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'

In that

On 20 August 2010 at Southwark Crown Court Mr G D Gray ACA was convicted of one count of fraud, one count of proceeds of crime – acquiring criminal property - and two counts of theft.

Hearing date

7 June 2011

Pre-hearing review or final hearing Final Hearing

Complaint found proved Yes, on the defendant's own admission.

All heads of complaint proven Yes, on the defendant's own admission.

Sentencing order Exclusion

Parties present The defendant did not attend the hearing. The tribunal decided to proceed in his absence.

Represented The defendant was not represented.

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 a letter for the defendant dated 14 May 2011 with enclosures.

The IC's case

The IC's case was that the defendant's conviction for offences involving dishonesty (which were indictable offences) constitutes professional misconduct. This complaint was not defended.

Issues of fact and law

The existence of the defendant's conviction was agreed between the parties.

Conclusions and reasons for decision

- 1 The defendant was in a position of trust as an accountant when he seriously abused that position and committed fraud and theft. This is, self-evidently, conduct which the ICAEW cannot tolerate from its members. Applying the *Guidance on Sentencing*, exclusion is the only appropriate penalty for such serious professional misconduct.

Matters relevant to sentencing

- 2 Mitigating factors were the defendant's previously clean disciplinary record, his early guilty plea when charged, and his remorse. His financial circumstances persuaded the tribunal not to award a fine. The hurt that his dishonesty has caused third parties is an aggravating factor.

Sentencing Order

- 3 Exclusion.
- 4 It is not within the tribunal's power to decide whether or not the defendant will ever be readmitted to membership of the ICAEW. It recommends that no application for readmission be entertained for a period of five years. Any such application will be decided by the Readmissions Sub-Committee of the Investigation Committee, on its merits, at the time.

Decision on publicity

- 5 Publicity with name.

Members of the tribunal

Mr Oliver Grundy FCA [Chairman]
Mr Ian Walker FCA
Mr Richard Woodman

Mr Dominic Spenser Underhill [Legal Assessor]

D6805

2 John Mitchell Johnstone ACA of JMJ Accountancy, 10 Watermark Way, Foxholes Business Park, Hertford SG13 7TZ

The tribunal of the Disciplinary Committee made the decision recorded below having heard a formal complaint on 14 June 2011

Type of Member Member

Terms of complaint

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

'...performed his professional work or the duties of his employment, or conducted his practice, inefficiently or incompetently to such an extent, or on such a number of occasions, as to bring discredit on himself the Institute or the profession of accountancy.'

In that

Between 26 January 2009 and 9 July 2009 Mr J M Johnstone ACA, issued audit reports, in respect of the financial statements of the following companies, when he was not a Registered Auditor.

- i West Anglia (Essex) Limited for the year ended 31 March 2008
- ii West Anglia Insulation Limited for the year ended 31 March 2008

Hearing date

14 June 2011

Previous hearing date(s)

9 March 2011
5 April 2011

Pre-hearing review or final hearing Final Hearing

Complaint found proved Yes

All heads of complaint proven Yes

Sentencing order

The tribunal ordered that the defendant:

- a) be severely reprimanded;
- b) pay a fine of £10,000; and
- c) pay costs of £1,349.

Procedural matters and findings

Parties present	The Investigation Committee (IC).
Represented	Mr Fin O’Fathaigh on behalf of the IC.
Hearing in public or private	The hearing was held 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 applications	Being satisfied as to service, the tribunal decided to proceed in the defendant’s absence.

Issues of fact and law

- 1 In September 2009 the Regulatory Support team received an anonymous call from a member of the public which indicated that Mr J M Johnstone was a partner of JMJ Accountancy and that the firm had been carrying out audit work. At the time the Regulatory Support team were unable to find any record of Mr Johnstone registering this firm with the ICAEW. Despite attempts to contact Mr Johnstone by email on 8 September 2009, 24 November 2009, 26 November 2009 and 5 January 2010 to seek his clarification on the matter he did not reply.
- 2 The QAD carried out a visit on 10 February 2010. In its report the QAD confirmed that Mr Johnstone had been engaged in public practice as a sole practitioner with the firm of JMJ Accountancy since February 2007 without informing ICAEW. Mr Johnstone estimated his firm’s gross practice income for the year ended 31 March 2010 as £200,000.
- 3 It was discovered that the firm of JMJ Accountancy had signed the following two audit reports when the firm was not a Registered Auditor:
 - West Anglia Insulation Limited, year ended 31 March 2008 audit report dated 26 January 2009; and
 - West Anglia (Essex) Limited, year ended 31 March 2008, audit report undated.
- 4 The ICAEW wrote to Mr Johnstone on 31 March 2010 setting out the complaint. No response was received and further letters were sent on 22 April 2010 and 13 May 2010. When the ICAEW received no reply to the last letter, Mr Johnstone was advised of the formal wording of the complaint on 25 June 2010. He did not respond.

Conclusions and Reasons for Decision

- 5 Mr Johnstone signed two audit reports on behalf of his firm JMJ Accountancy when the firm was not a registered auditor. This is contrary to the Companies Act and Audit Regulations, which are designed to ensure that only the appropriately qualified personnel can undertake audit work. By his actions which, giving Mr Johnstone the benefit of the doubt, the tribunal put down to inefficiency or incompetency, it found that he had brought discredit on himself the Institute and the profession. He is accordingly in breach of Disciplinary Bye-law 4(1)(b).

Matters relevant to sentencing

- 6 Mr Johnstone had no previous disciplinary record.
- 7 He had provided no mitigation to the tribunal.
- 8 The tribunal took into account its *Guidance on Sentencing*. The public was entitled to have confidence in the assurance that audit by a registered auditor provides. To sign an audit report on behalf of a firm, when not authorised is a serious breach of professional rules and the Companies Act.
- 9 It was a seriously aggravating feature of this matter that Mr Johnstone had failed to reply to the ICAEW and provide any explanation for his actions. His lack of engagement with the ICAEW, in fact, dated back to February 2007 and showed a determination not to cooperate with his regulator. The standards expected of chartered accountants may only be maintained if the ICAEW's members engage with the ICAEW and facilitate its role in this regard.
- 10 Mr Johnstone provided no evidence as to his financial means.

Sentencing Order

- 11 The tribunal ordered that the defendant be severely reprimanded, pay a fine of £10,000 and pay costs of £1,349.

Decision on publicity

- 12 The tribunal ordered that there be publicity for this decision.

Members of the tribunal

Mr Richard Lea FCA [Chairman]
Mr Michael Swift FCA
Mr Tony Foster

Ms Melanie Carter [Legal Assessor]

D6806

3 **Jasani & Co** of 54 Dukes Wood Drive, Gerrards Cross, Bucks, SL9 7LR

The tribunal of the Disciplinary Committee made the decision recorded below having heard a formal complaint on 14 June 2011

Type of Member Firm

Terms of complaint

That the defendant is liable to disciplinary action under Disciplinary Bye-law 6(2)(a) namely it has:

‘..... committed a breach of any regulations issued by the Institute in its capacity as a Recognised Supervisory Body under the Companies Act 1989 or in any comparable capacity under any legislation, wherever in force, for the time being designated in regulations’.

In that

- 1 Jasani & Co carried out the audit of the financial statements of the following companies, in breach of Audit Regulation 3.02, in that the firm should have expected that the total fees receivable from the Sunrise Radio group of companies would regularly exceed 10% of the annual fee income of the firm but failed to disclose that expectation to those charged with governance of the audit client or to arrange an external independent quality control review of those audit engagements before the audit reports were finalised:
 - a Sunrise Radio Limited, for the year ended 31 December 2005, audit report dated 20 October 2006;
 - b Kismat Radio Limited for the year ended 31 December 2005, audit report dated 20 October 2006;
 - c Club Concorde Limited for the year ended 31 December 2005, audit report dated 20 October 2006;
 - d Hayes Gate House Limited for the year ended 31 December 2005, audit report dated 29 October 2006;
 - e Time FM 107.5 Limited for the year ended 31 December 2005, audit report dated 19 October 2006;
 - f Tristar Broadcasting Limited for the year ended 31 December 2005, audit report undated;
 - g London Media Company for the year ended 31 December 2005, audit report dated 19 October 2006.

- 2 Jasani & Co carried out the audit of the financial statements of the following companies, in breach of Audit Regulation 3.02, in that the firm should have expected that the total fees receivable from the Sunrise Radio group of companies would regularly exceed 15% of the annual fee income of the firm.
 - a Sunrise Radio Limited, for the year ended 31 December 2006, audit report dated 16 October 2007;

- b Kismat Radio Limited for the year ended 31 December 2006, audit report dated 16 October 2007;
- c Club Concorde Limited for the year ended 31 December 2006, audit report dated 16 October 2007;
- d Hayes Gate House Limited for the year ended 31 December 2006, audit report dated 16 October 2007;
- e Palm FM Limited for the year ended 31 December 2006, audit report dated 15 October 2007;
- f Time FM 107.5 Limited for the year ended 31 December 2006, audit report dated 16 October 2007;
- g Tristar Broadcasting Limited for the year ended 31 December 2006, audit report dated 16 October 2007;
- h London Media Company for the year ended 31 December 2006, audit report dated 16 October 2007;
- i Sunrise Radio Limited, for the year ended 31 December 2007, audit report dated 29 September 2008;
- j Kismat Radio Limited for the year ended 31 December 2007, audit report dated 29 September 2008;
- k Club Concorde Limited for the year ended 31 December 2007, audit report dated 29 September 2008;
- l Hayes Gate House Limited for the year ended 31 December 2007, audit report dated 29 September 2007;
- m Palm FM Limited for the year ended 31 December 2007, audit report dated 8 October 2008;
- n Time FM 107.5 Limited for the year ended 31 December 2007, audit report dated 29 September 2008;
- o Tristar Broadcasting Limited for the year ended 31 December 2007, audit report dated 29 September 2008;
- p London Media Company for the year ended 31 December 2007, audit report dated 29 September 2008.

Hearing date

14 June 2011

Previous hearing date(s)

9 March 2011
5 April 2011

Pre-hearing review or final hearing Final Hearing

Complaint found proved Yes

All heads of complaint proven Yes

Sentencing order

The tribunal ordered that defendant firm:

- a) be severely reprimanded;
- b) pay a fine of £5,000;
- c) pay costs of £3,434.

Procedural matters and findings

Parties present Mr Jasani, on behalf of the defendant firm.

The Investigation Committee (IC).

Represented Mr Fin O’Fathaigh on behalf of 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 as to service.

Documents considered by the tribunal The tribunal considered the documents contained in the IC’s bundle together with documents provided by Mr Jasani

Findings on preliminary applications Mr Jasani consented on behalf of the defendant firm, for the tribunal to consist of just two members, the third tribunal member being absent. In light of this the tribunal decided to proceed with just two members

Issues of fact and law

- 1 Mr A Jasani FCA is a sole practitioner of the firm, Jasani & Co. The firm was originally scheduled for an audit monitoring visit to take place in November 2007 and the visit was rescheduled several times due to Mr Jasani's personal problems. Following the submission of a report to PAC on 2 April 2009, Mr Jasani agreed to a combined audit and practice assurance visit, which took place on 23 and 24 June 2009. The QAD reviewer identified the issue of the firm continuing in audit appointments when fees exceed 15% of the fee income of the firm. At the time of the visit, the firm's only audit was a group, comprising 14 companies. Recurring audit fees were estimated at £25,500 compared with gross practice income of approximately £100,000, although his response to the closing meeting notes states that recurring fees are now £10,000. Jasani & Co had acted as auditor of the group for several years, when audit fees earned regularly exceeded 25% of the firm's practice income.
- 2 The firm appeared to lack awareness of the original requirements of s1.201 and there was no evidence that the firm had any awareness of the new Ethical Standards. The first head of complaint relates to audits carried out under the transitional provisions of Ethical Standard 4 (ES4), so in effect the principles set out in s1.201 apply.
- 3 The revised Ethical Standards were introduced in 2004 and contained more stringent requirements. ES4 states that where it is expected fees from both audit and non-audit services receivable from a non-listed company and its subsidiaries will regularly exceed 15% of the annual fee income of the audit firm, the firm shall either resign, or not stand for reappointment, as appropriate. The firm was required to consider the fee dependence issue, for the first time, by reference to ES4, for the year ended 31 December 2006.
- 4 Mr Jasani commented on independence in the 2007 annual return. He stated that while the client fees are substantial, they did not impair his objectivity and independence. He further noted that he was not reliant on those fees as he did not expect the income to continue for very long.
- 5 Mr Jasani appeared unaware of the requirements as to fee levels and independence and the firm continued to act as auditor for the two years ended 31 December 2007, being the third year after ES4 was implemented without making any changes. Audit fees from the group represented over 25% of total firm income in respect of the firm's years ended 31 May 2005-2008 inclusive.
- 6 The firm was precluded from carrying out the 2006 and 2007 audits on the basis that the fees from this group had exceeded 15% in each of the years from 2005 to 2007 (and previously although less stringent requirements were in place for that period). Mr Jasani advised Audit Regulation that his audit fees were significantly lower for 2008 and that, in the past, there had been a one-off surge of fees which was non-recurring work. This work was not expected to recur in 2008 because the client had taken the accountancy function in house. Irrespective of any non-audit work, the thresholds were exceeded.

Conclusions and Reasons for Decision

- 7 The tribunal found the complaint proven on the defendant firm's own admission.
- 8 Audit Regulation 3.02 states that a Registered Auditor must act in accordance with the fundamental principles set out in the Code of Ethics issued by the Council and the ethical standards. Jasani & Co acted as auditor when fees earned from one group of audit clients clearly represented a threat to the firm's independence. It was a matter of considerable concern that the firm was unaware of the fee dependency issue and

consequently continued to act in 2006 and 2007 when it should have resigned as auditors.

- 9 The firm has failed to comply with Disciplinary Bye-law 6(2)(a) in that it has committed a breach of the regulations issued by the Institute in its capacity as a Recognised Supervisory Body under the Companies Act 1989 or in any comparable capacity under any legislation, wherever in force, for the time being designated in regulations.

Matters relevant to sentencing

- 10 Mr Jasani explained to the tribunal the significant personal problems he and his family had been facing over the relevant period. In addition, he expressed regret that he did not seek the assistance of the ICAEW in resolving his difficulties over fee levels from the group of companies for which the firm acted.
- 11 The defendant firm had no previous disciplinary record.
- 12 The tribunal took into account its *Guidance on Sentencing* and the defendant firm's mitigation. It noted that the Ethical Standards' provisions on group client fee levels commanded considerable importance amongst the regulatory requirements for chartered accountants. Their importance lay in the guarantee that registered auditors provide that they are independent and free from the inappropriate influence of clients. It is only if an auditor can guarantee their independence that the confidence of the public may be maintained.
- 13 The tribunal was of the view that the increasing fee level was such an obvious problem that Mr Jasani, on behalf of the firm, should have been aware of dangers the firm and therefore his clients were facing. He took no steps to address the problem despite promising the ICAEW at one point that he would. Finally, the tribunal took into account that Mr Jasani has been deficient in responding to the Institute's correspondence.

Sentencing Order

- 14 In light of the above, the tribunal ordered that the defendant firm be severely reprimanded, pay a fine of £5,000 and ordered to pay costs of £3,434.

The tribunal ordered that the fine and costs be paid in 12 monthly instalments, a first payment of £734 to be made by 1 August 2011 with the remaining monthly payments set at £700.

Decision on publicity

Publicity with name.

Members of the tribunal

Mr Richard Lea FCA [Chairman]
Mr Michael Swift FCA
Mr Tony Foster

Ms Melanie Carter [Legal Assessor]

D6807

4 Timothy Higginson FCA of 53 Battledean Road, Highbury, London, N5 1UX

The tribunal of the Disciplinary Committee made the decision recorded below having heard a formal complaint on 15 June 2011

Terms of complaint

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 ... committed any act or default likely to bring discredit on himself, the Institute or the profession of accountancy'

In that

On 22 April 2010 Mr Timothy Higginson FCA gave an undertaking to the Secretary of State for Business Innovation and Skills in accordance with section 1A of the Company Director Disqualification Act 1986 with effect from 22 April 2010 that he would not for a period of 10 years be a director of a company, not be concerned in the management of a company or act as an insolvency practitioner.

Hearing date

15 June 2011

Previous hearing date(s)

16 March 2011

19 April 2011

Pre-hearing review or final hearing Final Hearing

Complaint found proved Yes

All heads of complaint proven Yes

Sentencing order

The tribunal ordered that the defendant:

- a) be excluded;
- b) pay a fine of £2,000; and
- c) pay costs of £2,700.

Procedural matters and findings

Parties present

The Investigation Committee(IC)
The defendant was not present.

Represented	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 as to service.
Documents considered by the tribunal	The tribunal considered the documents contained in the Investigation Committee's bundle.
Findings on preliminary applications	Being satisfied as to service and, from an email dated 31 May 2011, that Mr Higginson was aware of the date of the hearing, the tribunal decided to proceed in his absence.

The IC's case

1 Disciplinary Bye-law 7(2)(b) provides as follows.

Proof of certain matters

7(1) ...

(2) The fact that a member, member firm or provisional member –

(a)

(b) 'has had a disqualification order made against him or has given a disqualification undertaking which has been accepted by the Secretary of State under the Company Directors Disqualification Act 1986, shall, for the purposes of these bye-laws, be conclusive evidence of the commission by him of such an act or default as is mentioned in bye-law 4(1)(a) or 5(1)(a), as the case may be'.

2 The IC submitted that as Mr Higginson has had a disqualification order made against him, he is in breach of Disciplinary Bye-Law 4(1)(a).

Issues of fact and law

3 Mr Higginson gave an undertaking with effect from 22 April 2010 to the Secretary of State, that he would not be a director or manage a company, or be an insolvency practitioner for a period of 10 years. The agreed schedule of unfit conduct to the disqualification undertaking confirmed the matters in paragraphs 2 to 6:

4 Mr Higginson was a director of Atlantic Fashions Limited that went into administration on 21 January 2008 and subsequently creditor's voluntary liquidation on 18 December 2008. The company had assets of £210,459 and there was a deficiency as regards creditors of £5,726,192.

5 Specific matters of unfitness identified were that Mr Higginson:

- allowed his co-director to act as a director and in the management of the company when he knew that the co-director was disqualified from doing so;

- allowed Atlantic Fashion to enter into transactions which were to the detriment of its creditors and at a time when he knew the company was insolvent and would shortly be placed in administration; and
 - failed to prevent his co-director withdrawing money from the company's bank accounts and allocating it to the co director's shareholder loan account.
- 6 His co-director, was himself subject to a disqualification order from 19 October 2001 until 18 October 2008. However, the co-director had made an application on 20 July 2001 for permission to act as a director of Atlantic Fashion. In support of this application Mr Higginson was appointed a director and filed a witness statement in which he said he would ensure that financial controls were imposed at Atlantic Fashions. The application was refused by the court and the co-director withdrew his appeal in May 2002. Mr Higginson was aware that no further applications were made.
- 7 By the time of the administration:
- the company owed £1,863,286 to HMRC;
 - there were 13 County Court judgments registered against the company; and
 - there had been 24 attempts to levy distraint.
- 8 Between 27 April 2006 and 3 September 2007 a total of £138,000 was paid to his co-director and between 6 September 2007 and 12 November 2007, £24,000 to the co-director's wife.
- 9 Mr Higginson wrote to the ICAEW stating that:
- he never contested that he knew about the co director's disqualification but believed he acted promptly to protect the assets of the company;
 - payments made to various suppliers and to the director were made after the insolvency practitioners were called in and he had no knowledge of them. As he was not on the bank mandate he could not have stopped them;
 - there was an overdrawn director's loan account that was debited with co director's drawings. This was supported by signed cross guarantees from his ex-mother in law. He would not sign the accounts after the third director's death until he was assured by the auditors that the debt was good, otherwise the company would have been insolvent; and
 - he considered the demise of Atlantic Fashions was not related to unfit conduct and notes that a significant proportion of the retail clothing industry 'went bust in 2008/2009'.
- 10 Mr Higginson wrote to the ICAEW to state that he wanted to challenge the DTI on its evidence; however, as they would not state the amount of costs he would have to pay if he went to court, he was forced to sign the undertaking. He is currently considering whether to withdraw his undertaking, which he has stated he is allowed to do. He therefore considers the ICAEW's intervention premature and untimely. Though in an email to the Institute dated 31 May 2011 he said the 'ICAEW should not hold up its proceedings'.
- 11 However, there is no evidence, other than emails from Mr Higginson that he is taking any steps to apply to set aside the disqualification order nor has he provided any evidence that such an application has a reasonable prospect of success.

Conclusions and Reasons for Decision

- 12 The tribunal found the complaint proven.
- 13 Despite Mr Higginson knowing that his co-director was disqualified from acting as a director, he allowed him to act as a director or to act in the management of the company. He caused or allowed the company to enter into transactions which were to the detriment of its creditors and allowed the co-director to withdraw money from the company and allocate it to his shareholder's loan account. He accepted these matters pursuant to the statement of agreed facts and entered into a disqualification undertaking on that basis.

Matters relevant to sentencing

- 14 Mr Higginson had no previous disciplinary record.
- 15 The tribunal took into account its *Guidance on Sentencing*. The tribunal noted that Mr Higginson's period of disqualification is significant. The fact of the disqualification and that it was for 10 years would, in the tribunal's view, undermine the public's confidence in the standards of the profession. The tribunal considered moreover, that the underlying facts (which were agreed by Mr Higginson in the Schedule to the undertaking) indicated he had fallen well below the standards expected of a chartered accountant. In these circumstances, no lesser sanction than exclusion and a fine were warranted.

Sentencing Order

- 16 The tribunal ordered that the defendant be excluded, pay a fine of £2,000 and pay costs of £2,700.
- 17 The tribunal recommended that any application for readmission not be entertained by the ICAEW before the defendant's period of disqualification has come to an end. It noted that any such application would be considered by the Readmissions Sub-Committee and that readmission, given the nature and circumstances of the Disqualification Undertaking, could not be guaranteed.

Decision on publicity

- 18 Publicity with name.

Members of the tribunal

Mr Paul Brooks [Non-Accountant Chairman]
Mr Elliott Harris FCA
Mr Kevin Mawer FCA

Ms Melanie Carter [Legal Assessor]

D6808

5 Kiran Shah [ACA] of 87 Devonshire Road, Palmers Green, London, N13 4QU

The tribunal of the Disciplinary Committee made the decision recorded below having heard a formal complaint on 15 June 2011

Terms of complaint

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 ... committed any act or default likely to bring discredit on himself, the Institute or the profession of accountancy.’

In that

1 Mr K S Shah ACA, caused or permitted his firm, Henderson & Co, to act (i) as auditor for Dominion Energy Plc in the period 26 November 2004 to 28 November 2008 and for (ii) ESV Group plc in the period 31 August 2006 to 29 August 2008 when he knew, this would cause his firm to be in breach of ethical standards in force at the relevant time in that the total fees received from each of these companies regularly exceeded 10% of the firm’s gross practice income in those years, such that the following audits should not have been carried out:

- i Dominion Energy Plc for the year ended 30 June 2004, audit report dated 26 November 2004;
- ii Dominion Energy Plc for the year ended 30 June 2005, audit report dated 29 November 2005;
- iii Dominion Energy Plc for the year ended 30 June 2006, audit report dated 30 November 2006;
- iv Dominion Energy Plc for the year ended 30 June 2007, audit report dated 30 November 2007;
- v Dominion Energy Plc for the year ended 30 June 2008, audit report dated 28 November 2008;
- vi ESV Group Plc for the period ended 31 March 2007, audit report dated 31 August 2007;
- vii ESV Group Plc for the year ended 31 March 2008, audit report dated 29 August 2008.

Particulars of breaches in relation to Dominion Energy Plc:

Year	Total Fee Income of the firm to 31 March	Firm income from audit and non audit services 30 June	%	Ethical Guidance then in force
2004	40,000	4,000	10	1.201
2005	50,000	8,000	16	1.201
2006	54,000	10,000	19	ES4
2007	53,000	10,000	19	ES4
2008	55,000	10,000	18	ES4

Particulars of breaches in relation to ESV Group plc:

Year	Total Fee Income of the firm to 31 March	Firm income from audit and non audit services to 31 March	%	Ethical Guidance then in force
2007	53,000	12,500	24	ES4
2008	55,000	18,328	33	ES4

- 2 Mr K S Shah ACA, on behalf of his firm, Henderson & Co, wrote to the ICAEW on 27 June 2003 when he said that his firm was ‘...resigning as auditors of Dominion Plc with immediate effect.’, yet he continued to act for the company, signing five audit reports between November 2004 and November 2008.
- 3 Mr K S Shah ACA, on behalf of his firm, Henderson & Co, provided incorrect information on the firm’s 2008 annual return in that he falsely stated that his firm had completed an audit compliance review.
- 4 Mr K S Shah ACA, on behalf of his firm, Henderson & Co, signed an audit report dated 28 November 2008, in respect of the financial statements of Dominion Energy Plc for the year ended 30 June 2008, after he was informed by the ICAEW’s Quality Assurance Department that he was failing to comply with paragraph 24 of the ES4 of the APB Ethical Standards by continuing to act as auditor.

Hearing date

15 June 2011

Previous hearing date(s)

3 November 2010
 15 February 2011
 19 April 2011

Pre-hearing review or final hearing Final Hearing

Complaint found proved Yes

All heads of complaint proven Yes

Sentencing order

The tribunal ordered that:

- a) the defendant be excluded;
- b) pay a fine of £5,000; and
- c) pay costs of £4,200.

Procedural matters and findings

Parties present Mr Kiran Shah ACA and the Investigation Committee (IC).

Represented Mr Ben Jowett, representing 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 provided by the defendant.

Findings on preliminary applications

Issues of fact and law

- 1 Mr Shah is a sole practitioner of a firm called Henderson & Co, operating from his home in Palmers Green, North London.
- 2 Henderson & Co was selected for a routine QAD visit in line with the three year cycle of visits to firms with listed clients and the visit took place on 28 and 29 October 2008. The Audit Registration Committee considered the QAD report at its meeting on 10 June 2008 and decided to withdraw the firm's audit registration in view of the QAD findings. Issues identified at the QAD visit were referred to the Investigation Committee.

First head of complaint – Fee dependency issue

- 3 Audit Regulation 3.02 states that a Registered Auditor must act in accordance with the fundamental principles set out in the Code of Ethics issued by the Council and the Ethical Standards.
- 4 A fee dependence issue had been identified in the earlier QAD visit in 2002. At this time, s1.201 of the Guide to Professional Ethics provided that engagements could continue to be carried out provided appropriate safeguards were followed, where fees for listed clients exceeded 10% of practice income. Such safeguards included arranging for external hot file reviews on the audits concerned.
- 5 Mr Shah acknowledged in a letter dated 28 May 2003 that he was aware that total fees should be below 10% of total practice income and said 'I will abide by this rule.' His firm's audit registration was continued on the basis that the fee dependency issue would be addressed and Mr Shah subsequently agreed to resign as auditor. The firm's response to the QAD report in 2008 stated that 'I did resign from the Aim listed client and copy of the letter of resignation was sent to the Audit Registration Committee'.

- 6 Revised Ethical Standards were introduced in 2004 and contained more stringent requirements than s1.201. Ethical Standard 4 (ES4); Fees, remuneration and evaluation policies, litigation, gifts and hospitality states that where it is expected, fees from both audit and non-audit services receivable from a listed company and its subsidiaries will regularly exceed 10% of the annual fee income of the listed audit firm, the firm shall either resign, or not stand for reappointment, as appropriate.
- 7 The tribunal found that Mr Shah had worked for Dominion Energy Plc and ESV Plc (ESV) for the periods and fees set out in the table in head 1 in the complaint. Fees from the ESV engagement represented 19% and 18% of total practice income in 2007 and 2008. The tribunal noted that these latter two percentages differed from the particulars in the table in head 1 of the complaint. However, as these percentages were still significantly above the relevant fee threshold, the tribunal did not view this as a material difference to the complaint's particulars.
- 8 Under s1.201 and ES4, the firm was unable to continue with the audit of Dominion or accept the appointment as auditor of ESV. Mr Shah, on behalf of the firm did not provide any details of any safeguards he adopted.
- 9 Mr Shah had signed seven audit reports when he should not have undertaken those audits as the fee income from these (two) clients represented an unduly large proportion of the firm's annual income for the years when the audits were conducted.

Second and fourth heads of complaint

- 10 In respect of the 2nd head of complaint, Mr Shah had written to the ICAEW on 28 June 2003 to say that he (his firm) had resigned on 27 June 2003 as auditor to Tecton Plc and its OFEX subsidiary, Dominion. The subsidiary became a Plus market quoted company on the dissolution of OFEX.
- 11 However, Mr Shah did not resign from Dominion, signing five audit reports between November 2004 and November 2008. His audit file was reviewed during the 2008 QAD visit when QAD noted that the record of audit work performed was very poor on all files reviewed and that the quality of the audit files had significantly deteriorated since the previous QAD visit, six years earlier.
- 12 Relevant to the fourth head of complaint, Mr Shah was notified during the QAD visit that he should not undertake the Dominion audit because the audit fee exceeded 10% of practice income, yet he still signed the audit report for the year ended 30 June 2008, on 28 November 2008.
- 13 Mr Shah provided comments at the closing meeting with the QAD reviewer. He said that the Plus market companies were within the dependency limits for the first few years and considered that even after he resigned from the AIM company, his income was increasing and he was within the dependency limits.
- 14 Mr Shah confirmed within the 2008 annual return, received on 6 October 2008, that
'The firm has breached the 10% rule on an audit client. The firm's aim has been to get more clients. However, I have suffered ill health for a considerable part of the year, and have been unable to increase the client base. My aim is to improve my health and consequently increase my client base'.
- 15 Although Mr Shah was aware that he had breached the rule, he continued acting for Dominion.

Third head of complaint – providing incorrect information in annual return.

- 16 Mr Shah submitted an audit annual return which falsely stated that the firm had undertaken cold file reviews.
- 17 Mr Shah confirmed, at E3.7 of the 2008 annual return that an ACR was completed on 15 July 2008 and that at E3.8 the firm had retained a record of the ACR, covering the work done. Mr Shah confirmed in the open meeting of the QAD visit that a review was not undertaken.

Conclusions and Reasons for Decision

- 18 The tribunal found the complaint proven on the defendant's own admission. It noted that certain of his misconduct had been deliberate and had continued over a considerable period of time. He had been on notice that he should not be carrying out audits in relation to the clients whose fees exceeded the fee threshold (Mr Shah contended that the threshold in respect of OFEX listed companies was 15%: even if that were the case, the fees earned were above this, a fact he accepted). Of particular concern was his provision of false information to the ICAEW and that he appeared not to recognise that by breaching the regulations his firm's independence was or would be seen to be compromised.
- 19 The tribunal noted that the Ethical Standards' provisions on group client fee levels commanded considerable importance amongst the regulatory requirements for chartered accountants. Their importance lay in the requirement that registered auditors are independent and free from the inappropriate influence of clients. It is only if an auditor can guarantee its independence that the confidence of the public may be maintained.
- 20 His conduct had brought discredit upon ICAEW, himself and the profession of chartered accountancy.

Matters relevant to sentencing

- 21 Mr Shah had a previous disciplinary record dating back to 26 July 2010. This was an unpublicised caution for failing to respond in writing to concerns arising from the Practice Assurance visit in 2008.
- 22 In mitigation, Mr Shah explained that he had hoped that his overall practice income would increase and subsequently he had made efforts to merge his practice, but to no avail. He pointed out that he had issued a qualified audit report in 2008 thereby illustrating that there had not, in reality, been any negative impact on his independence. He also drew attention to a letter from the Chairman of Dominion Energy in 13 June 2011 stating that he had asked Mr Shah to continue with the 2008 audit despite his resignation.
- 23 He brought to the tribunal's attention his family and health issues during the relevant period. Finally, he pointed out that as his audit registration had already been withdrawn there were no further public protection issues.
- 24 The tribunal took into account its *Guidance on Sentencing* and Mr Shah's mitigation. In particular, it noted his ill health and family issues. It did not accept however that his attempts to merge over 5 years could excuse his failure to comply with the requirements for independence.

- 25 Mr Shah had been on notice throughout that independence was an issue and chose to ignore the regulatory requirements. On one occasion he provided false information to the ICAEW. These failings call into question his integrity and fitness to practice as a chartered accountant. The tribunal treated as aggravating factors, his previous disciplinary record (which arose essentially from non-cooperation with the ICAEW) and that he had benefited financially by retaining the audit fees. The tribunal was of the view that the seriousness of the breach was such that no lesser penalty than exclusion was warranted.
- 26 The starting point for a breach of this nature is exclusion and a fine of £25,000. Taking into account the particular circumstances of this case and Mr Shah's means, the fine imposed was £5000.

Sentencing Order

- 27 The tribunal ordered that the defendant be excluded, pay a fine of £5,000 and pay costs of £4,200.
- 28 The Tribunal recommended that any application for readmission not be entertained by the ICAEW before the end of two years from the date of the order. It noted that any such application would be considered by the Readmissions Sub-Committee and that readmission could not be guaranteed.

Decision on publicity

- 29 Publicity with name.

Members of the tribunal

Mr Paul Brooks [Non-Accountant Chairman]
Mr Elliott Harris FCA
Mr Kevin Mawer FCA

Ms Melanie Carter [Legal Assessor]

D6809

6 Henry Mark Brownson FCA of 113 Union Street, Oldham , OL1 1RY

The tribunal of the Disciplinary Committee made the decision recorded below having heard a formal complaint on 6 July 2011

Terms of complaint

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, the Institute or the profession of accountancy'

In that

Between 21 January 2003 and 20 June 2003 he received commission in the region of £128,600 as a result of introducing clients to the Tower Group, which:

- i) he failed to disclose in accordance with Section 1.205, Conflicts of Interest and Confidential Information of the members' handbook;
- ii) he failed to account for, in accordance with Section 1.314, Accounting for Commission of the members' handbook.

Hearing date

6 – 7 July 2011

Previous hearing date

12 April 2011 (directions)

Pre-hearing review or final hearing Final Hearing

Complaint found proved Yes

All heads of complaint proved Yes

Sentencing order

The tribunal ordered that:

- a) the defendant be reprimanded;
- b) pay a fine of £5,000; and
- c) pay costs of £6,000

Procedural matters and findings

Parties present

The Investigation Committee (IC) through its legal representative
Mr Brownson FCA

Represented	Fin O’Fathaigh on behalf of the IC Paul Parker of Counsel instructed by Weightmans LLP on behalf of Mr Brownson
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 copy witness statements and annexures of (i) Paul Winfield (as redacted); (ii) Peter Fox (as redacted); (iii) Henry Brownson; (iv) Stephen Mills; (v) Stephen Tittensor; (vi) Colin Patterson; (vii) Sabar Hussain; (viii) Richard Noar. In addition, the tribunal considered the skeleton argument presented by the IC and the outline submissions on behalf of the defendant submitted by Mr Parker.
Findings on preliminary applications	No witnesses gave oral evidence except for Mr Brownson. Their witness statements were put before the tribunal before the hearing. In the morning of the first day of the hearing, an issue arose as to the extent of the agreement on written evidence reached between the parties. The IC on its own volition withdrew the evidence of Mr Rangeley (whose witness statement the tribunal has put from its mind) and withdrew specific parts of the evidence of Mr Fox and Mr Winfield (which the tribunal has also put from its mind). Thus, the defendant did not challenge the balance of the witness evidence adduced by the Investigation Committee which was not withdrawn.

The IC’s case

The IC’s case is that the defendant introduced clients of his firm to an Independent Financial Advisor called Campbell Montague which was, in turn, inviting an investment opportunity in film finance schemes afforded by (amongst others) the Tower Group. Between 21 January 2003 and 20 June 2003, the defendant received commissions as a result of these introductions, totalling about £128,600. The defendant failed to disclose those commissions to his clients and failed to account to his clients for them. These failures were not in accordance with Section 1.205 and 1.314 of the Members’ Handbook. The defendant denied the complaint.

Facts found, facts in issue and issues of law/regulation

Facts Found

- 1 The defendant is a sole practitioner; he is in public practice and offers accounting and tax advice to clients who are mainly in the dental profession.
- 2 It is the custom of the defendant to send to each client an engagement letter which follows a format obtained from the ICAEW.

- 3 One of the terms of the letter states under the heading 'Commissions or Other Benefits': *'In some circumstances, commissions or other benefits may become payable to us in respect of transactions which we arrange for you, in which case you will be notified in writing of the amount and terms of payment. The fees that would otherwise be payable by you as described will take into account the benefit to us of such amounts. You consent to such commission or other benefits being retained by us without our being liable to account to you for any such amounts.'*
- 4 Under the heading 'Fees', another term of the letter states: *'Our charges are computed on the basis of fees for the time spent on your affairs (which depends on the levels of skill and responsibility involved) and disbursements incurred in connection with the engagement. If work is required outside the scope of this letter...then this will be a separate engagement for which additional fees will be chargeable. We will add Value Added Tax, if applicable, at the current rate....'*
- 5 One of the services the defendant offers, in addition to normal accountancy services, is the possibility for clients with large tax bills and cash flow issues to invest in tax reduction or tax deferral schemes. Some schemes were offered by Sale & Leaseback Film Partnerships. The defendant invested in two such schemes ('the scheme'), one of which was called the Tower Scheme operated through the Tower Group ('the scheme' and 'Tower').
- 6 The defendant specifically brought the existence of the schemes to the attention of those of his clients who were earning £100,000 or more before tax and after deductions. He suggested the schemes to these clients as, in his opinion, they might benefit those clients by reducing their tax payment liabilities for the current and following tax years and possibly helping them to obtain tax refunds for the previous three tax years. The defendant had acted for many of these clients for a number of years. Where a client expressed interest, the defendant suggested that the client met a firm of financial intermediaries called Campbell Montague & Co ('Campbell Montague') which introduced the schemes to the defendant in the first place, and Tower. Sometimes the defendant arranged such a meeting, and sometimes the client did. It was Campbell Montague which suggested to the defendant that clients with the £100,000 threshold mentioned above would be suitable.
- 7 When a meeting had been arranged, the promoters of the scheme requested the defendant to carry out work about his client. This work included (i) reviewing the relevant tax years against which the scheme was to be used; (ii) if a client was a dentist, ascertaining whether losses were to be utilised against a particular year (which, in turn, determined whether the client made superannuation contributions and/or private pension contributions); (iii) if a client was a dentist who had made private pension contributions and superannuation contributions, the calculation of how losses would interact with the A9 concession and whether or not the A9 election had been breached. If the election had been breached, ascertaining how much of the client's private pension contributions or superannuation contributions could be utilised or disallowed and whether tax returns should be amended; (iv) the consideration of the effect of charity donations made by a client; (v) 'numerous other factors' depending on the individual client and their financial losses and gains for the relevant tax year.
- 8 The purpose of this work (which would take about three to four days to carry out) was to enable the defendant to calculate the interaction between the schemes and their effect on the client's pension and charitable donations. When the work was complete, the defendant sought the client's consent to send the work product to Campbell Montague/Tower.

- 9 At the meeting with Campbell Montague/Tower, the defendant was normally present because he would, as the meeting progressed, be reviewing the client's accounts with the client and considering their tax position. The defendant would explain to his client the fiscal consequences of the scheme for the client in relation to reducing his or her tax liability.
- 10 After these meetings, and when clients decided to enter a scheme, the defendant carried out other work. This included: (i) preparing clients' tax returns in the light of their entry into the scheme; (ii) ensuring that the clients' tax liability was reduced; (iii) answering client queries in relation to the schemes and corresponding with Campbell Montague about them; (iv) dealing with HM Revenue & Customs about the schemes on behalf of clients; (v) liaising with the schemes' accountants on behalf of clients; (vi) reviewing the clients' affairs and reporting to them.
- 11 The tribunal finds that the work described in paragraphs 7 – 10, and which was described by Mr Brownson in his witness statement and confirmed orally by him, constitutes professional advice. During the carrying out of this work, the defendant admitted that he acted as his clients' agent.
- 12 Once a client had entered into a scheme, the defendant would answer queries from clients who had entered into a scheme as the scheme worked itself out. To answer such queries he would liaise with Campbell Montague, Tower and HM Revenue & Customs. He did so as his clients' agent.
- 13 The defendant acted on behalf of the client in a fiduciary capacity (and not Campbell Montague or Tower) when carrying out the work described above. There is no evidence of any separate engagement letter or supplemental agreement in respect of such work.
- 14 Over half of the defendant's clients took up at least one of the schemes. When a client invested in the scheme, the Defendant was remunerated by Campbell Montague.
- 15 Entitlement to such payment was an oral agreement between the defendant and Campbell Montague whereby the defendant would be paid 0.75% of the sum invested in a scheme by any client of the defendant introduced by him. The defendant received such payments by BACS transfer from Campbell Montague & Co totalling about £128,600 in the period 21 January 2003 to 20 June 2003. The defendant did not send any invoice or any VAT receipt to Campbell Montague. He received remittance advices from Campbell Montague.
- 16 The defendant did not charge any client a fee for the work he did for them when they were considering entering into the scheme or entering into the scheme nor receive any payment from them. The defendant did not render any invoice to a client or to Campbell Montague or to Tower. The defendant did not disclose in writing to any client; (a) that a payment will result or is likely to result; and (b) when the fact was known to him, that such payment will be received; and (c) as early as was possible, the amount of the payment and its terms. The defendant did not obtain the informed consent of the client about these payments.
- 17 The defendant did not account to the client for the payment either by paying the whole of it to the client or by deducting the amount received from fees chargeable to the client by showing such deduction on the face of any bill. He did not obtain the client's advance, general or specific consent to each receipt of any payment.

Facts in Issue

- 18 Whether or not the payments were commission.
- 19 Whether or not the defendant gave professional advice to his clients when they were considering investing in the scheme and after they had entered into it.
- 20 Whether or not the defendant was acting as a fiduciary when he was carrying out the work on behalf of his clients as described above.

Legal/Regulatory Issues

- 21 If the payments are commission, whether the defendant has failed to disclose them in accordance with Section 1.205 and/or has failed to account for them in accordance with Section 1.314 of the Member's Handbook.

Conclusions and Reasons for Decision

- 22 The tribunal finds as a matter of fact, and on the balance of probabilities, that the payments were commission payments. The defendant failed to disclose and account for those commissions to his clients in accordance with Sections 1.205 and 1.314 of the Members' Handbook.
- 23 For the avoidance of doubt, the tribunal has not been asked to make any finding on whether or not the defendant acted in bad faith or dishonestly and makes no such finding.
- 24 Also for the avoidance of doubt, the tribunal has not been asked to make any finding as to the defendant's liability, if any, under financial services legislation and the related regulatory regime, and makes no such finding.
- 25 The tribunal notes that the witness statements adduced by the IC do not speak of any questions whether the defendant; (i) introduced the scheme to his clients; (ii) explained the scheme to them; (iii) advised his clients about the scheme; and (iv) administered the scheme.
- 26 The Members' Handbook does not define 'commission' in terms. A definition is suggested (but not, as the defendant asserts, provided) at Part 1.205 Section A 3.0 headed '*Conflicts of interest arising from receipt of commission or other benefits from a third party*'. It is '*....any benefit [that] is or is likely to be received by a member...from a third party for the introduction of a client or as a result of advice given to a client.*'
- 27 The tribunal seeks to give 'commission' its ordinary English meaning and to apply that to the context of para 3.0. The Shorter Oxford English Dictionary (3rd edition) defines 'commission' (in the financial context) as '*a pro rata remuneration for work done as agent*'. This definition is helpful and is consistent with para 3.0 quoted above. The tribunal thus construes 'commission' within the current context to mean a *pro rata* remuneration paid by a third party for (a) the introduction of a client or (b) as a result of advice given to a client.
- 28 This definition provides that commission could arise *either* from the introduction of a client to a third party *or* as a result of advice given to a client.

- 29 The IC submits that the payments made by Campbell Montague to the defendant were by their nature, those of commission. This is accepted. As their conduct clearly shows, the defendant and Campbell Montague orally agreed, at some point after October 2001, that after the defendant, through his firm, successfully introduced one of his clients as an investor in a scheme, Campbell Montague would pay to the defendant a fee. The amount of the fee was calculated as a percentage of the gross earnings of the client. This is, by any reasonable standard, evidence of the paying of 'introductory' commission by a third party to a member of the ICAEW for introducing clients to that third party.
- 30 The tribunal has found that the defendant gave accountancy advice to his clients in connection with the clients' consideration of entering into the scheme and, if they decided to enter into the scheme, the remaining investors in it. The tribunal does not accept the defendant's evidence that the work he had done and described in his witness statement is not advice but merely work of a 'secretarial and arithmetical' nature. Neither does the tribunal accept that the defendant's attendance with the clients at the meetings with Campbell Montague/ Tower had no advisory function at all.
- 31 Whether or not the advice is investment or other advice for the purposes of financial services legislation is not a matter with which the tribunal is concerned.
- 32 There is a plain connection between the accountancy advice the defendant gave to his clients about the possibility of them entering into the scheme, and them entering into it; for example, were it not for the work that the defendant did for them which he has described, it is hard to see how the clients could have come to the point of deciding to enter into the scheme as insufficient data would have been available to them.
- 33 The defendant accepts that the payments were made after the client was introduced to the scheme and that the amount of the payment was calculated as a percentage of the gross earnings of the client. (So much is described by Campbell Montague in its letter of 16 October 2009). However, he argues, the payments were, in fact, fees 'for work properly done' for the client and not simply because he introduced a client to the scheme. This argument fails for a number of reasons.
- 34 First, it must be part of the defendant's case that he invariably records the terms of his engagement with his clients in an engagement letter; but, exceptionally in the case of the schemes, either expressly (but even then only orally) or impliedly agreed with a client that (a) he would carry out extensive work for that client; (b) he would be entitled to charge the client for that work; but (c) in fact, he will instead be paid the fee by a third party where (i) the basis for calculating the remuneration is not explained to the client at all; and (ii) the basis of the remuneration is in fact different to the basis of remuneration which would have applied had the client been charged in the normal way (i.e. on an hourly basis); and (d) the client would never be told how much the fee would be or when it would be paid. This is simply not plausible. Moreover, a far more plausible, and workaday, interpretation of the evidence is available, namely that there was a bilateral agreement with Campbell Montague and the defendant whereby for every client the defendant sent its way, he would be paid a percentage of the client's income. For this to work, the client has to know and do nothing, or very little.

- 35 Second, fundamental to the defendant's case is the notion that the defendant: (a) performs a professional service for a client; and (b) a third party pays the defendant for that work. This means, in effect, that the third party is paying the defendant's professional fees on behalf of the client (albeit calculated on a percentage basis) because the defendant's evidence was that he was not carrying out work for the third party. For this arrangement to work there has to be agreement to this effect between all three parties and they have to be *ad idem* on all the terms. But there is simply no such agreement in evidence, either oral or written, either in the documents or in the defendant's testimony. Indeed, on the evidence, the client does not even know (as opposed to assume) even that the defendant will be paid; he only knows that he will not be charged. He does not know who, if anyone will pay the defendant, let alone how much and how that fee will be calculated.
- 36 Furthermore, if this was the true legal relationship between the parties, it is trite accounting practice that the defendant ought to have rendered VAT invoices to the client for professional services rendered, making them expressly payable by the third party. (The invoice could where appropriate also show the payment by the third party offsetting the amount billed.) This is because the defendant has rendered professional services to the client; it is only that a third party and not the client shall pay for them. Nowhere does the defendant suggest that he worked for free.
- 37 The defendant should, furthermore and in any event, also have charged for his 'out of pocket expenses' which he has admitted he incurred on the client's behalf and which, in any event, will have incurred a VAT charge of 17.5%. As it was, the defendant rendered no invoices at all to anyone, even for his VAT able expenses.
- 38 The tribunal considers that the absence of such invoices to the client, stipulating, as they ought to have done, that they are payable by a named third party, is evidence that the legal relationship of the kind the defendant argues was in place, actually was not. It rejects the defendant's submission that such an absence proves nothing. On the contrary, such an absence of invoices suggests, more credibly, that the actual arrangement was the payment by a third party of *pro rata* commission in consideration for the introduction of clients.
- 39 The IC indicates an absence of VAT receipts from the defendant is evidence suggestive of a commission arrangement. The defendant submits that either the defendant was being paid for the provision of professional financial intermediary services or was being paid an introduction/referral fee, but not both, which is what the IC appears to be arguing. This is to misunderstand the IC's position, which is very simple. The relevant HMRC Guidance is in essence that a commission payment is not subject to VAT, whereas a fee is. Since there is no evidence of a VAT receipt, that is suggestive of the payments being commission and not a fee. The tribunal agrees. The complete absence of any invoices and any VAT accountability at all suggests evidentially the existence of a commission arrangement more strongly than a fee arrangement.
- 40 The IC submits that the existence of remuneration calculated at a pre-agreed rate of 0.75% of the gross shelter income tends to prove that the fixed fee is in the nature of a commission. The defendant argues that this does not necessarily follow, and that many professionals provide their services for fixed or percentage fees. The commercial rationale, the defendant explains, that 'what they might lose on one swing they might gain on the next roundabout.' The defendant gave evidence that he often charges his clients by agreeing a fixed fee.

- 41 The tribunal favours the IC's submission. It is common knowledge that commissions are often calculated by reference to a percentage of a denominated amount. The agreement between the defendant and Campbell Montague that he would be remunerated on a percentage basis is not offensive to the notion of a commission. It is also true that a fee calculated as a percentage is not conclusive proof that it is a commission. But it does not have to be conclusive proof. It is enough that, on the specific facts of this case, a pre-agreed rate of remuneration on a percentage basis is more likely to prove the existence of a commission than an agreement to be remunerated with 'money for work properly done', where that work is a professional service. Such is the case here.
- 42 The evidence supporting the defendant's position is weaker and is rejected. First, his contemporaneous engagement letters refer to the calculation of fees on an hourly basis, not a percentage or fixed fee basis. There is no contemporaneous evidence that he charged the scheme clients for professional fees on such basis. The defendant's assertion made in a letter dated February 2010 and again at the hearing, some 7 or 8 years after the events in question, that he charges on a fixed fee basis is of negligible weight and it is not supported by the documents. Second, there is no evidence that the scheme clients agreed to be charged for professional services not only on a percentage basis, but at the identical percentage as the one used by Campbell Montague. Third, while it is accepted as general knowledge that professionals sometimes charge on a percentage basis, it is with the client's consent; it is not, as the defendant is forced to argue, without the client's consent but only with the consent of the party who is paying the bill but who is not the recipient of the professional service. On balance, the pre-agreed percentage rate is more probative of a commission than 'money for work properly done'.
- 43 For all these reasons, and assessing the evidence not only severally as a sum of its parts, the tribunal is persuaded that, on the balance of probabilities, the payments received by the defendant were by their nature commission for the defendant introducing his own clients to Campbell Montague or as a result of giving accountancy advice to clients. There is in contrast scant and implausible evidence that the payments were for work done for the clients.
- 44 Having found that between 21 January 2003 and 20 June 2003 the defendant received commission of about £128,600 as a result of introducing clients to the scheme, has the defendant failed to disclose the commission in accordance with Section 1.205 and 1.314 of the members' handbook? The answer is yes, for the following reasons.

Failure to Disclose

- 45 Section 1.205 Section A para 2.1 provides, in summary, that a test as to whether a self-interest threat to the objectivity of a member has arisen is whether a reasonable and informed observer would perceive that the objectivity of the member is likely to be impaired ('the objectivity test'). A member should be able to satisfy himself and the client that any conflict can be managed with available safeguards.
- 46 Section 1.205 Section A para 3 provides that a self-interest threat will arise where any benefit (including commission) is or is likely to be received by a member from a third party for the introduction of a client or as a result of advice given to a client.

- 47 The tribunal construes the objectivity test to apply to para 3. Paragraph 3.1 sets out safeguards. There is no evidence that the defendant put in place any such safeguard, including (i) disclosing in writing to a client (a) that a commission will result or is likely to result; and (b) when the fact is known, that such commission or benefit will be received; and (c) as early as possible, the amount of the commission and its terms; (ii) obtaining the informed consent of the client.
- 48 In view of the facts found, it is not possible to draw any other reasonable conclusion that, in the absence of any such safeguards, a reasonable and informed observer would perceive that the objectivity of the defendant is likely to be impaired. Thus, a self-interest threat has arisen.

Failure to Account

- 49 Section 1.314 para 1 of the Members' Handbook provides that if a person in a fiduciary position receives commission from a third party in the course of and arising out of that relationship, that benefit belongs to the beneficiary of the fiduciary relationship. The person holding the fiduciary position must account to the beneficiary for its full value and is entitled to retain the commission only with the fully informed consent of the beneficiary.
- 50 Paragraph 2 provides that a fiduciary relationship between an accountant and his client will arise where the accountant acts as the client's agent and/or where the accountant gives professional advice to the client so as to give rise to a relationship which the law would regard as one of trust and confidence.
- 51 Paragraph 3 provides that a member is accountable to a client for the monetary value of any benefit he gains from such a position, if he fails to obtain the client's consent to retain the benefit on the basis of adequate disclosure,
- 52 Paragraph 4 provides that as a matter of general law, a member must adopt one of the following courses: (i) accounting to the client for the commission by payment of the whole commission or by deducting the amount received from fees otherwise chargeable to the client and by showing such deduction on the face of the bill; or (ii) obtaining the client's advance consent to each receipt of commission; or (iii) obtaining the client's advance general consent to each receipt of commission for example by way of the engagement letter or a supplementary agreement to that letter.
- 53 The Handbook offers suggested wording for a provision in the engagement letter or supplementary agreement. It is very similar to the wording in the defendant's engagement letter quoted in para 3 above.
- 54 The Handbook also states (amongst other things) the following about such a provision: *'Before the client agrees to any such provision, he must be given examples of likely commissions that may be received and the likely amounts, and it should be emphasised that these are only examples and may not cover all receipts in future. If, in the future, abnormally large commissions are received which were not envisaged when the engagement letter was signed, it would be advisable to obtain specific consent to the retention of those commissions in order to meet any assertion that retention of such commission was not authorised by the engagement letter.'*
- 55 The defendant has argued that if it was correct that he was a fiduciary with an obligation to account to his client for commission, it would be surprising, inequitable and unacceptable for him to pay to his clients the money he received from Campbell Montague; this is because he would be paying a client for work he has done for that client.

- 56 This is to misunderstand the defendant's professional rights, duties and the way he is required to account to a client. The defendant has at all material times acted in a fiduciary relationship with his clients. He did so having agreed to receive commission from Campbell Montague when he introduced those clients. It is his legal duty either to account to the client for that commission or to obtain the client's advance informed consent to that. If he is to account to the client, then he either pays the whole amount over to the client or he deducts the amount received from the fees otherwise chargeable to the client and shows that deduction on his bill. So much is made clear in Section 1.314. para 4.
- 57 It is the defendant's evidence, which has been accepted, that he could have charged his client for the work he did, but did not because he was paid by Campbell Montague. Unless he obtained the client's advance informed consent, the proper course of action was to account to the client for the commission by deducting the amount received from the fees otherwise chargeable and showing that deduction on his bill. There is nothing surprising, inequitable or unacceptable about that; it is good practice.
- 58 The tribunal has found that the defendant probably had not obtained his clients' advance general consent to the retaining of commission; this is because while he included in his retainer letter the wording suggested by the ICAEW, there is no evidence that the wording referred to the work undertaken in connection with the schemes and so consent cannot be inferred. Furthermore, the defendant did not comply with his own obligation to notify clients *'in writing of the amount and terms of payment'*. He also ignored his own stipulation that *'The fees that would otherwise be payable by you as described will take into account the benefit to us of such amounts. You consent to such commission or other benefits being retained by us without our being liable to account to you.'*
- 59 In view of the facts found, it is not possible to draw any other reasonable conclusion than that the defendant has failed to account to his clients for the commission he has received in breach of Section 1.314 of the Members' Handbook.

Matters relevant to sentencing

- 60 The tribunal considered the following as mitigating factors: (i) the defendant's clean disciplinary record; (ii) the fact that the events in question took place some eight years ago *coupled with* no evidence that the misconduct has been repeated but, rather, has been addressed; (iii) no real risk of the misconduct reoccurring. The tribunal sees no reason to depart from the *Guidance in Sentencing* in this matter. These factors have reduced the sentence to a reprimand (as opposed to anything more severe) with a fine.

Sentencing Order

- 61 The tribunal ordered that the defendant be reprimanded, fined £5,000 and ordered to pay costs of £6,000.

Decision on publicity

Publication with name.

Members of the tribunal

Oliver Grundy FCA [Chairman]

David Wilton FCA

Richard Woodman

Dominic Spenser Underhill [Legal Assessor]

D6810

Cessation of membership

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

Ian D Howes of HMN Accountants, Ashford, Kent

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

Investigation Committee Consent Orders

Consent Order made on 23 August 2011

- 8 With the agreement of HMN Accountants Ltd of Woodlands, Bourne Lane, Hamstreet, Ashford, Kent, TN26 2HH, the Investigation Committee made an order that the firm be severely reprimanded, fined £2,500 and ordered to pay costs of 727, with respect to a complaint that:

Between 24 April 2007 and 15 June 2010, HMN Accountants Limited, failed to submit to the Institute the results of an external cold file review in relation to the following audit carried out by the firm, as required by the Audit Regulation Department:

- X Limited, year ended 30 April 2007, audit report dated 17 August 2007.

D6789

Consent Order made on 24 August 2011

- 9 With the agreement of Mohammed Hashim of 36 Derby Lane, Cavendish, Derby, DE23 8UA, the Investigation Committee made an order that the member be reprimanded, fined £1,000 and pay costs of £1,650 with respect to a complaint that:

Mr Mohammed Hashim engaged in public practice between February 2010 to 22 March 2011, contrary to Regulation 25 of the Learning Professional and Development Regulations.

D6790

Consent Order made on 1 September 2011

- 10 With the agreement of H W Chartered Accountants of 23 Alghitha Road, Skegness, Lincolnshire, PE25 2AG, the Investigation Committee made an order that the firm be reprimanded, fined £2,000 and ordered to pay costs of £680, with respect to a complaint that:

HW Chartered Accountants for the two years ended 5 April 2008 prepared the financial statements of X Limited, but failed to advise the directors that the company did not meet the conditions for exemption from audit under s249A Companies Act 1985 in that the balance sheet total exceeded the audit exemption threshold of £2.8m.

D6791

Consent Order made on 8 September 2011

- 11** With the agreement of C H Ivens & Co of 50 Regent Street, Rugby, Warwickshire, CV21 2PU, the Investigation Committee made an order that the firm be reprimanded, fined £1,000 and ordered to pay costs of £1,380, with respect to a complaint that:

C H Ivens & Co incorrectly issued the following Accountant's Reports, but failed to advise the directors of those companies that they did not meet the conditions for exemption from audit under s477(1) Companies Act 2006 in that the balance sheet total exceeded the audit exemption threshold of £3.26m:

- (i) Accountant's Report dated 15 April 2010 on the financial statements of X Limited for the year ended 31 August 2009
- (ii) Accountant's Report dated 30 September 2010 on the financial statements of Y Limited for the year ended 31 December 2009
- (iii) Accountant's Report dated 30 September 2010 on the financial statements of Z Limited. **D6795**

- 12** With the agreement of David Martin Reeve of Harvern, Colber Lane, Bishop Thornton, Harrogate, HG3 3JR, the Investigation Committee made an order that the member be severely reprimanded, fined £2,000 and pay costs of £1,180 with respect to a complaint that:

Mr D M Reeve issued the following audit reports in the name of his firm, David Reeve, in respect of the accounts of X Limited, when his firm was not a Registered Auditor:

- (i) Audit report dated 14 January 1998 in respect of the accounts for 30 weeks ended 30 April 1997
- (ii) Audit report dated 4 February 1999 in respect of the accounts for the year ended 30 April 1998
- (iii) Audit report dated 31 January 2000 in respect of the accounts for the year ended 30 April 1999
- (iv) Audit report dated 7 February 2001 in respect of the accounts for the year ended 30 April 2000
- (v) Audit report dated 9 December 2001 in respect of the accounts for the year ended 30 April 2001
- (vi) Audit report dated 21 January 2003 in respect of the accounts for the year ended 30 April 2002
- (vii) Audit report dated 21 January 2004 in respect of the accounts for the year ended 30 April 2003
- (viii) Audit report dated 28 January 2005 in respect of the accounts for the year ended 30 April 2004
- (ix) Audit report dated 31 January 2006 in respect of the accounts for the year ended 30 April 2005
- (x) Audit report dated 20 February 2007 in respect of the accounts for the year ended 30 April 2006

- (xi) Audit report dated 22 February 2008 in respect of the accounts for the year ended 30 April 2007
- (xii) Audit report dated 18 December 2008 in respect of the accounts for the year ended 30 April 2008
- (xiii) Audit report dated 1 December 2009 in respect of the accounts for the year ended 30 April 2009. **D6794**

Regulatory Decisions

Audit Registration Committee

Order made on 10 August 2011

- 13** Keith, Vaudrey & Co, Chartered Accountants, First Floor, 15 Young Street, London W8 5EH, has agreed to pay a regulatory penalty of £2,500, which was decided by the Audit Registration Committee. This was in view of the firm's admitted breach of breach of audit regulation 7.01 in that it had failed to comply with a condition previously imposed on the firm's on-going audit registration. **D6792**

Order made on 10 August 2011

- 14** Marshall & Co, 19-21 Crewe Road , Alsagar, Stoke-on-Trent , ST7 2EP, has agreed to pay regulatory penalties totalling £1,500, which were decided by the Audit Registration Committee. This was in view of the firm's admitted breach of audit regulations 2.02, 2.11 and 3.04(a) in that the firm failed to notify ICAEW of a change in circumstances and to re-apply for audit registration and that a principal in the firm acted as company secretary of an audit client. **D6801**

Order made on 10 August 2011

- 15** Gutteridge Scanlan, 5 High View Close, Hamilton Office Park, Hamilton, Leicester, LE4 9LJ has agreed to pay a regulatory penalty of £3,500, which was decided by the Audit Registration Committee. This was in view of the firm's admitted breach of audit regulation 6.06 in that the firm failed to comply with assurances previously given to the Quality Assurance Department following an audit monitoring visit. **D6802**

Order made on 11 August 2011

- 16** KPMG LLP, 15 Canada Square, London, E14 5GL, has agreed to pay a regulatory penalty of £1,500, which was decided by the Audit Registration Committee. This was in view of the firm's admitted breach of Audit Regulation 4.04, in that audit reports were signed by an individual who was not, at the time, properly appointed as a responsible individual of the firm. **D6793**

Order made on 12 September 2011

- 17** The registration as company auditor of M. Emanuel, 5 Lexham Garden Mews, Kensington, London, W8 5JQ, was withdrawn on 12 September 2011 under audit regulation 7.03(c) of the Audit Regulations and Guidance 2008 for failure to submit an annual return. **D6803**

Order made on 14 September 2011

- 18** YPO, Chartered Accountants, The Granary, Hags Farm Business Park, Hags Road, Harrogate, North Yorkshire HG3 1EQ has accepted a regulatory penalty of £1,500 offered by the Audit Registration Committee for the firm's admitted breach of audit regulation 4.04 in that, on one small group of companies, seven audit reports were signed by a partner in the firm who is not a responsible individual. **D6804**