



# *Disciplinary Orders and Regulatory Decisions*

**DATE PUBLISHED: 1 AUGUST 2019**

## **Disciplinary orders**

Disciplinary Committee tribunal orders

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## DISCIPLINARY COMMITTEE TRIBUNAL ORDERS

### 1. Mr Benjamin Dzialowski [ACA]

London, United Kingdom

**A tribunal of the Disciplinary Committee made the decision recorded below having heard a formal complaint on 14 May 2019**

**Type of Member**                      Member

#### **Terms of complaint**

1. Between 29 May 2008 and 30 June 2016, Mr Benjamin Dzialowski ACA engaged in public practice through 'A' Ltd without professional indemnity insurance as required by Regulation 3.1 of the Professional Indemnity Insurance Regulations.
2. Between 1 July 2017 and 10 October 2017, Mr Benjamin Dzialowski ACA engaged in public practice through 'A' Ltd without professional indemnity insurance as required by Regulation 3.1 of the Professional Indemnity Insurance Regulations.
3. Between 1 July 2017 and 26 September 2018 Mr Benjamin Dzialowski ACA engaged in public practice through 'B' without professional indemnity insurance as required by Regulation 3.1 of the Professional Indemnity Insurance Regulations.
4. Between 28 June 2017 and 10 October 2017, Mr Benjamin Dzialowski ACA failed to submit the 2016 annual return for 'A' Ltd contrary to Practice Assurance Regulation 8.
5. Between 27 October 2017 and 26 September 2018 Mr Benjamin Dzialowski ACA failed to submit the 2017 annual return for 'B' contrary to Practice Assurance Regulation 8.
6. Between 28 June 2017 and 10 October 2017, Mr Benjamin Dzialowski ACA engaged in public practice through 'A' Ltd and he did not complete a return to ICAEW to confirm compliance with the Professional Indemnity Insurance Regulations, as required by Regulation 2.5 of the Professional Indemnity Insurance Regulations.
7. Between 27 October 2017 and 26 September 2018 Mr Benjamin Dzialowski ACA engaged in public practice through 'B' and he did not complete a return to ICAEW to confirm compliance with the Professional Indemnity Insurance Regulations, as required by Regulation 2.5 of the Professional Indemnity Insurance Regulations.
8. Mr Benjamin Dzialowski ACA failed to comply with regulation 11 of the Practice Assurance Regulations as he failed to notify ICAEW within 10 business days of the receipt of a letter dated 7 September 2017, that the date of the Practice Assurance visit scheduled for 'B', and 'A' Ltd for 6 October 2017 was not convenient and failed to provide in writing three further dates when the visit would be convenient within 45 days of the original visit date.

Mr Benjamin Dzialowski is therefore liable to disciplinary action under Disciplinary Bye-law 4.1c.

Disciplinary Bye-law 4.1 states .... A member, provisional member, foundation qualification holder, provisional foundation qualification holder or CFAB student (all hereinafter referred to as 'respondent') shall be liable to disciplinary action under these bye-laws in any of the following cases, whether or not he was a member, provisional member, foundation qualification holder, provisional foundation qualification holder or CFAB student at the time of the occurrence giving rise to that liability:

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

**Hearing date**

14 May 2019

**Previous hearing date(s)**

None

**Pre-hearing review or final hearing**

Final Hearing

**Complaint found proved**

Yes

**All heads of complaint proven**

Yes

**Sentencing order**

An order for exclusion, a financial penalty of £5,000 and an order to pay the costs of the Investigation Committee in the sum of £5,224

**Procedural matters and findings**

The tribunal was satisfied that regulations 3 and 5 of the Disciplinary Regulations have been observed, and that it should proceed in the absence of the Respondent

**Parties present**

The Respondent was not present nor represented

**Represented**

Ms Jessica Sutherland-Mack represented the Investigation Committee

## 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 (IC's) bundle

## The Investigation Committee's (IC's) case

### 1.1. Background.

The Respondent operates a sole practice, 'B', and was also the sole director of 'A' Ltd. The turnover for 'B' for the year ended 30 April 2015 was £75,300 and for 'A' Ltd for the year ended 31 May 2015 was £11,500.

1.2. Both firms are ICAEW member firms and were subject to a Practice Assurance cyclical visit carried out by desktop review on 6 July 2016. The reviewer identified that the Respondent had not arranged PII cover for 'A' Ltd from its incorporation in 2008 until 30 June 2016.

1.3. Companies House records show that 'A' Ltd was dissolved on 10 October 2017 following a compulsory strike-off notice issued by Companies House on 25 July 2017 due to failure to file the statutory accounts for the period ended 28 May 2016.

1.4. In March 2017, the PAC Committee had noted that the Respondent had not made a substantive response to the letter sent to him on 6 December 2016 requesting an explanation as to why no PII cover had been arranged for 'A' Ltd until 1 July 2017. The Committee asked that the Respondent provide the information by 21 April 2017.

1.5. At a further PAC meeting on 24 May 2017 and in light of the Respondent's lack of response, the committee decided a follow up QAD visit was required and that the Respondent should pay for the cost of the visit.

1.6. The Respondent failed to arrange the follow up QAD visit, and this matter was considered by the PAC at their meeting on 20 November 2017. The committee decided to refer the failure to arrange the QAD visit to the Professional Conduct Department for investigation.

1.7. The Respondent has also failed to submit the Practice Assurance annual returns for 'A' Ltd for the year ended 30 June 2016 and for 'B' for the year ended 30 June 2017.

### 2. Complaints against the Respondent in respect of 'A' Ltd, 1, 2, 4 and 6.

'A' Ltd was incorporated on 29 May 2008 and the Respondent advised that it had commenced trading that month, having taken over another practice operated by him. 'A' Ltd was required to submit annual returns from this date, and to confirm its PII arrangements annually under regulation 2.5 of the PII regulations. Firms are asked to confirm details of the PII arrangements that they hold within the Practice Assurance annual returns.

3. It was identified that no PII cover was held for 'A' Ltd from the date of incorporation until 1 July 2016 when the company was added onto the PII policy for 'B'. No evidence has been supplied showing PII cover was in place for that period.
4. Although separate annual returns were sent to 'B' and 'A' Ltd between 2009 and 2015, each year the Respondent only submitted one annual return for 'B', and sent an accompanying letter which confirmed that the details provided in the annual returns covered both firms. Although he was requested to provide separate annual returns for each of the practices, he continued to submit just the one annual return to cover both. Therefore, it was not identified prior to the QAD desk top review in July 2016 that 'A' Ltd did not have PII cover.
5. Following the QAD review, the Respondent arranged for 'A' Ltd' to be added onto the PII policy for 'B' effective from 1 July 2016 to 30 June 2017. The cover arranged was a compliant ICAEW policy. No evidence has been provided that PII cover was in place for the period 1 July 2017 to 10 October 2017.
6. The Respondent was requested to submit an annual return for 'A' Ltd for the period ended 30 June 2016. This should have been submitted by 31 July 2016. A number of letters were sent and telephone calls made to the Respondent requesting submission of the 2016 annual return but it was not submitted. In addition, no return was provided to ICAEW to confirm compliance with the Professional Indemnity Insurance Regulations, as required by Regulation 2.5 of the Professional Indemnity Insurance Regulations.

7. Complaints against the Respondent in respect of 'B', 3, 5 and 7.

The Respondent was required to submit the 2017 annual return for 'B', which would confirm details of PII held since 1 July 2017. The Respondent has failed to submit the return meaning that he has failed to demonstrate that adequate PII arrangements are in place for 'B' since 1 July 2017 in breach of regulation 2.5 and 3.1 of the PII regulations. A number of letters were sent to the Respondent requesting submission of the 2017 annual return but he failed to submit it.

8. Finally, the Respondent failed to comply with regulation 11 of the Practice Assurance Regulations as he failed to notify ICAEW as required that the date of the Practice Assurance visit scheduled for 6 October 2017 was not convenient, and failed to provide in writing three further dates when the visit would be convenient within 45 days of the original visit date.

## **The Defence**

9. The Respondent has not appeared before the Tribunal, he has not arranged representation, he has not in any way engaged with the disciplinary process, and has not provided any response by way of defence to the complaints made against him.

## **Issues of fact and law**

10. The Tribunal has to consider the evidence provided by the IC, the relevant regulations, and the submissions made on behalf of the IC. It then has to decide whether or not each of the complaints has been proved, the burden of proof being upon the IC and the standard of proof being on a balance of probabilities.

## Conclusions and reasons for decision

11. 'A' Ltd and 'B' were under a clear obligation to have in place appropriate PII cover. In addition, they were obliged to make annual returns to the ICAEW confirming (amongst other matters) such cover. No return has been made, and there was (a) a failure to make any attempt to engage with the disciplinary process, and (b) a failure to furnish any evidence to demonstrate PII cover being in place for the relevant periods. The Tribunal therefore considered that it was entitled to draw the inference, from the evidence available to it, that no such cover was in place. Accordingly Complaints 1, 2 and 3 are proved.
12. The Tribunal was satisfied on the evidence that between 28 June 2017 and 10 October 2017, the Respondent failed to submit the 2016 annual return for 'A' Ltd contrary to Practice Assurance Regulation 8. In addition, between 27 October 2017 and 26 September 2018 the Respondent failed to submit the 2017 annual return for 'B' contrary to Practice Assurance Regulation 8. Complaints 4 and 5 are proved.
13. The Tribunal was satisfied that between 28 June 2017 and 10 October 2017, the Respondent engaged in public practice through 'A' Ltd and he did not complete a return to ICAEW to confirm compliance with the Professional Indemnity Insurance Regulations, as required by Regulation 2.5 of the Professional Indemnity Insurance Regulations.
14. In the light of the evidence, the Tribunal was satisfied that a failure to comply with Regulation 2.5 between 27 October 2017 and 26 September 2018 confirming compliance with the Professional Indemnity Insurance Regulations also occurred in respect of 'B' through which the Respondent engaged in public practice . Complaints 6 and 7 are proved.
15. Finally, on the evidence, the Respondent has failed to comply with regulation 11 of the Practice Assurance Regulations as he did not respond to a letter dated 7 September 2017 within 10 business days to notify ICAEW that the visit date of 6 October 2017 was not convenient, nor did he provide three alternative dates on which the visit could take place. He completely failed to engage in the process, and Complaint 8 is proved.

## Matters relevant to sentencing

16. The Tribunal considered the *Sanctions Guidance*. It was satisfied that the conduct was very serious, the Respondent avoided any regulatory compliance. His actions were deliberate as the Respondent must have been aware that he had failed to secure PII cover, and had not filed returns as requested. He must also have been well aware that he was not engaging in a site visit in the context of non-compliance with his obligations. The starting point was exclusion and a category D financial penalty. The Tribunal took account of the aggravating features: the breach in respect of PII cover continued in excess of a year, 8 years in the case of 'A' Ltd; that breach was not corrected; the Respondent undertook high risk work including tax advice; and the practice fees exceeded £5,000. The Respondent had no disciplinary record, a mitigating factor.

## **Sentencing Order**

17. Having regard to the totality of the misconduct of the Respondent, the Tribunal concluded that the fair and proportionate penalty was exclusion, with a financial penalty of £5,000.
18. No evidence of means had been provided by the Respondent. Costs of the IC were assessed at £5,224, that sum being a reasonable amount, and those costs are to be paid by the Respondent.

## **Decision on publicity**

19. Publication with name.

**Non Accountant Chairman**  
**Accountant Member**  
**Non Accountant Member**

Mr Richard Jones QC  
Mr Jon Newell FCA  
Mr Nigel Dodds

**038701**

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**2. Mr Malcolm Ellison [FCA]** of  
Newark, United Kingdom

**A tribunal of the Disciplinary Committee made the decision recorded below having heard a formal complaint on 14 May 2019**

**Type of Member** Member

**Terms of complaint**

Between 2 August 2016 and 11 May 2018 Mr Malcolm Ellison FCA engaged in public practice without a practising certificate contrary to Principal Bye-law 51a.

Mr Malcolm Ellison is therefore liable to disciplinary action under Disciplinary Bye-law 4.1.c.

Disciplinary Bye-law 4.1 states..... A member, provisional member, foundation qualification holder, provisional foundation qualification holder or CFAB student (all hereinafter referred to as 'respondent') shall be liable to disciplinary action under these bye-laws in any of the following cases, whether or not he was a member, provisional member, foundation qualification holder, provisional foundation qualification holder or CFAB student at the time of the occurrence giving rise to that liability

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

**Hearing date**

14 May 2019

**Previous hearing date(s)**

None

**Pre-hearing review or final hearing**

Final Hearing

**Complaint found proved**

Yes

**Sentencing order**

An order for exclusion, a financial penalty of £1,000, and an order for payment of the Investigation Committee's costs in the sum of £4,002

## **Procedural matters and findings**

The Respondent was not present nor represented, and indicated that he did not intend to appear before the Tribunal. The Tribunal was satisfied that proper notice of the hearing had been given under Regulation 3 and 5 of the Disciplinary Regulations, and that the hearing should proceed in the absence of the Respondent under Regulation 22.

## **Parties present**

The Respondent was not present nor represented

## **Represented**

Ms Jessica Sutherland-Mack represented the Investigation Committee

## **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 bundle (together with the Respondent's Regulation 13 statement and a letter from him dated 14<sup>th</sup> May 2019)

## **The Investigation Committee's (IC's) case**

1. Principal Bye-law 51a states:

*'Subject as may be provided in regulations, a member shall be entitled to engage in public practice in the United Kingdom or any other member state of the European Economic Area only if he holds a current practising certificate.'*

2. The position under the Council statement on engaging in public practice from 1 January 2008 and revised ICAEW statement effective 1 January 2017 is that a member will be regarded as being engaged in public practice if he is a principal in a public practitioner (being an entity which provides accountancy services to clients in anticipation of reward).
3. It was noted from a review of member profiles at the beginning of 2016 that the Respondent returned that he was a principal in a firm providing accountancy services, although ICAEW's records showed that his practising certificate had ceased on 11 July 2014. On raising this with the Respondent he responded on 8 April 2016 stating *'I do not think since qualifying I have been anything other than a member in practice.'*

4. In a further response on 28 April 2016 the Respondent stated '*I do not believe I have not paid fees demanded. I received a communication from ICAEW accounts telling me I had overpaid my fees due and that the balance would be carried forward. I queried this as it seemed a 'suspicious' communication but I was told it was in order. Sadly I no longer have copies of these documents.*'
5. In further responses the Respondent disclosed that he had been in part time practice since 2012 working 10 to 20 hours per week. He undertakes general accountancy work, comprising bookkeeping, VAT, payroll, accounts and tax. He had approximately 31 clients in 2014 and 53 clients in 2017. He does not undertake any marketing activities.
6. In view of the Respondent's comments, enquiries were made with ICAEW's Finance and Membership Departments as to what had occurred. Financial records show that Mr Ellison was often late in paying his subscriptions, including the practising certificate fee. The amount due for 2014, including the practising certificate fee, was £349. On 3 June 2014, Mr Ellison paid £45, which is the low rate membership subscription fee, and on 27 June 2014 he paid £100. As the £100 paid was not sufficient to cover the practising certificate and Practice Assurance fees, it was not allocated against those sums due. During 2014 and up to 10 June 2014, ICAEW's Finance Department telephoned Mr Ellison a number of times to clarify the position but was unable to contact him.
7. On 10 June 2014, the Respondent was emailed to ask if he still required a practising certificate, as no payment had been received for it, or if it should be cancelled. In the absence of a reply from the Respondent, the practising certificate and practice assurance fees totalling £304 were cancelled on 11 July 2014, leaving only the low rate membership subscription fee of £45. The Finance and Membership Department advised that at the time they did not notify members when they ceased their practising certificate for non-payment.
8. The amount of £100 was carried forward as a credit. On 28 January 2015 an email was sent to the Respondent advising him that there was a credit of £100 and an invoice of £50 for the low rate membership subscription raised. The Respondent was asked if this invoice should be covered by the credit. The Respondent queried this email and there is a subsequent email on 6 March 2015 stating that it was genuine and that there was a further credit of £50 which would be carried forward to the following year. On 29 January 2016 Mr Ellison was advised that this amount had been set against his 2016 membership fee on a low rate basis leaving a £1 balance.
9. On 2 August 2016, the Respondent was advised of the outcome of enquiries with the Finance and Membership Department and it was noted that the error arose partly due to the Respondent's late payments and payments on account and partly due to the miscommunication of the Finance and Membership Department as to payment carried over. As the Respondent was continuing to engage in public practice, the Respondent was expressly advised on this date that he was still acting in breach of regulations, and that he needed to either obtain a practising certificate or cease engaging in practice. No response was received to that letter.
10. The Respondent sent a letter to ICAEW on 19 August 2017 stating that he discussed his subscription fees with an ICAEW representative but made no comment as to applying for a practising certificate or ceasing to engage in public practice. His 2018 membership subscription is currently outstanding.
11. It is accepted by the IC that although the Respondent would have been aware he had not paid the full amount required for his practising certificate, the position was confusing in terms of communication from the Finance and Membership Department and therefore no complaint is brought for a failure to have a practising certificate from 11 July 2014 to 2 August 2016.

12. However, it was made clear to the Respondent on 2 August 2016 that he was in breach of Principle Bye-law 51a at that time but he has not contacted ICAEW to discuss what amounts he owed, to query the absence of a practising certificate or to renew his practising certificate.

### **The Respondent's Defence**

13. The Respondent has not appeared to explain or justify his conduct. His Regulation 13 statement disputes the complaint, but other than referring to confusion which arose over his payments and subsequent credits, no explanation has been given. In particular it is not explained why, after receipt of the letter dated 2 August 2016, no application was made for a practising certificate or alternatively why the Respondent did not cease to practise.

### **Issues of fact and law**

14. The Tribunal has to consider the evidence provided by the IC, the relevant regulations, and the submissions made on its behalf of the IC. It has to consider any material provided by the Respondent. It then has to decide whether or not the complaint has been proved, the burden of proof being upon the IC and the standard of proof being on a balance of probabilities.

### **Conclusions and reasons for decision**

15. The Tribunal considered there had been considerable confusion in terms of the allocation of late payments made by the Respondent to the different sums due to the ICAEW for different fees over different years. These fees comprised the practice assurance fee, the practising certificate fee, and the membership fee. The allocation of payments contributed to the state of the Respondent's account with the ICAEW and gave rise to misunderstandings regarding his practising certificate. In large measure this was due to the late payments made by the Respondent.
16. However, whatever the position was before 2<sup>nd</sup> August 2016, on that date the ICAEW sent a letter analysing the various credits and debits on the Respondent's account with the ICAEW. For present purposes, what was of critical importance was the clear statement of two alternatives. Either a practising certificate was to be obtained or the Respondent was to cease public practice. No practising certificate was obtained for the period 2<sup>nd</sup> August 2016 to 11<sup>th</sup> May 2018, and the Respondent remained in public practice.
17. In those circumstances, in the absence of any explanation from the Respondent, the Tribunal finds the complaint proved.

### **Matters relevant to sentencing**

18. The Tribunal considered the Sanctions Guidance. It was satisfied that the conduct was very serious, in that it was deliberate as the letter of 2<sup>nd</sup> August was very clear in its terms. The starting point was exclusion and a category D financial penalty. It took account of the aggravating features: the breach continued in excess of a year, 21 months; the breach occurred after a clear ultimatum; the Respondent undertook high risk work considering his client base; and the practice fees exceeded £5,000. The Respondent had no disciplinary record, a mitigating factor.

## **Sentencing Order**

19. Having considered all matters put before it, the Tribunal concluded that the proportionate and fair sanction is exclusion, together with a financial penalty of £1000. The latter has regard to the disclosed financial circumstances of the Respondent. An application was made for costs. Costs in the sum of £4002 were considered to be reasonable and are awarded to the IC.

## **Decision on publicity**

20. Publication with name.

**Non Accountant Chairman**  
**Accountant Member**  
**Non Accountant Member**

Mr Richard Jones QC  
Mr Jon Newell FCA  
Mr Nigel Dodds

**033030**

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**3. Mr Jeremy Ashley Boyden FCA** of  
Chelmsford, United Kingdom

**A tribunal of the Disciplinary Committee made the decision recorded below having heard a formal complaint on 4-8 February 2019 and 20-21 May 2019**

**Type of Member**                      Member

**Terms of complaint**

**Head of Complaint 1**

A. On or before 6 January 2012 Mr J Boyden FCA approved the submission of form CT600 for 'A' Limited for the year ended 31 March 2010, when he knew the form understated the financial position of 'A' Limited because it stated taxable profit for the year to be £200,000 lower than the profit shown in the abbreviated accounts filed at Companies House on 23 December 2010.

or in the alternative

B. On or before 6 January 2012 Mr J Boyden FCA approved the submission of form CT600 for 'A' Limited for the year ended 31 March 2010, when he should have known the form understated the financial position of 'A' Limited because it stated taxable profit for the year to be £200,000 lower than the profit shown in the abbreviated accounts filed at Companies House on 23 December 2010.

**Head of complaint 2**

A. On or before 18 December 2012, Mr J Boyden FCA approved the financial statements of 'A' Limited for the year ended 31 March 2012 when he knew the accounts understated the financial position of 'A' Limited, as profit for the year was £140,000 lower than the share of profit allocated from 'B' LLP for the same period.

or in the alternative

B. On or before 18 December 2012, Mr J Boyden FCA approved the financial statements of 'A' Limited for the year ended 31 March 2012 when he should have known the accounts understated the financial position of 'A' Limited, as profit for the year was £140,000 lower than the share of profit allocated from 'B' LLP for the same period.

**Head of complaint 3**

A. On or before 28 March 2013 Mr J Boyden FCA approved the submission of form CT600 for 'A' Limited for the year ended 31 March 2012, when he knew the form understated the financial position of 'A' Limited as taxable profit for the year was £140,000 lower than the share of profit allocated from 'B' LLP for the same period.

or in the alternative

- B. On or before 28 March 2013 Mr J Boyden FCA approved the submission of form CT600 for 'A' Limited for the year ended 31 March 2012, when he should have known the form understated the financial position of 'A' Limited as taxable profit for the year was £140,000 lower than the share of profit allocated from 'B' LLP for the same period

Mr Jeremy Ashley Boyden is therefore liable to disciplinary action under Disciplinary Bye-law 4.1a for heads of complaint 1A, 2A, 3A and under Disciplinary Bye-law 4.1b for heads of complaint 1B, 2B and 3B.

Disciplinary Bye-law 4.1a states: "if 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."

Disciplinary Bye-law 4.1b states: "if 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"

#### **Hearing date**

4-8 February 2019 and 20 – 21 May 2019

#### **Previous hearing date(s)**

None

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

**Complaints found proved** 1a, 2a, 3a

**Sentencing order** Reprimand and fine of £3,000 and ordered to pay costs of £40,000

**Procedural matters and findings** Mr Boyden denied all the Heads of Complaint

**Parties present** Mr Jeremy Boyden represented by Fiona Horlick of counsel instructed by Julie Norris of Kingsley Napley LLP  
Also present were co-Respondents, Mr 'C' and Mr 'D', represented by Fiona Horlick of counsel instructed by Julie Norris of Kingsley Napley LLP

The Investigation Committee of ICAEW was represented by Mark Vinal of counsel, instructed by Jessica Sutherland-Mack of the ICAEW legal department.

### **Hearing in public or private**

The hearing was in public but certain parts of the evidence were heard in private

### **Documents considered by the tribunal**

The tribunal considered the documents contained in the Investigation Committee's (IC's) bundle (together with together with together with 4 volumes of evidence submitted by Kingsley Napley LLP on behalf of the Respondent and two co-Respondents, Mr 'C' and Mr 'D', together with additional evidence served immediately before and during the first day's tribunal hearing.

### **Background**

1. 'A' Limited was a corporate member of the limited liability accountancy partnership 'B' LLP ("the LLP") carrying on business in Essex. Its sole source of income was its share of the profit of the LLP
2. At all material times, Mr Boyden was a partner of the LLP and a director/shareholder of 'A' Limited, based in Chelmsford. Mr C and Mr D were members of the LLP and directors/shareholders of 'A' Limited, based in Chelmsford. Mr 'E', the joint managing partner of the LLP, was based at the LLP's Romford office.
3. The timeline in relation to the filing of 'A' Limited's financial statement and corporation tax returns ("CT600s") was as follows:
  - 3.1 On 23 December 2010, 'A' Limited filed abbreviated financial statements for FY2010 at Companies House.
  - 3.2 On 24 December, 2011, 'A' Limited filed abbreviated financial statements for FY2011 at Companies House
  - 3.3 On 6 January 2012, Mr 'C' submitted 'A' Limited's CT600 corporation tax return for FY 2010.
  - 3.4 On 18 January 2012 Companies House received undated amended accounts for 'A' Limited for FY2011.
  - 3.5 On 2 November 2012, Mr 'E', Finance Partner of the LLP, submitted 'A' Limited's CT600 corporation tax return for FY2012.
  - 3.6 On 18 December 2012, 'A' Limited filed abbreviated accounts for FY2012 at Companies House.

- 3.7 On 28 March 2013, Mr 'D' submitted 'A' Limited's CT600 corporation tax return for 2012.
- 3.8 On 20 January 2014, 'A' Limited filed amended abbreviated financial statements for 2010, dated 16 January 2012.
4. The profit shares due to 'A' Limited reported in LLP's financial statements for FY2010 and FY2012 were higher than the profit share income reported by 'A' Limited in the corresponding year by £200,000 and £140,000 respectively. The filed Company financial statements for FY2010 reported profits that were £200,000 higher than 'A' Limited's corporation tax return (CT600) for FY2010.

#### **The Investigation Committee's (IC's) case**

5. The IC sought to prove, in respect of the each of the three 'A' Limited's documents, the CT600s for FY2010 and FY2012 and the abbreviated accounts for FY2012 –
  - 5.1 That it understated 'A' Limited's financial position for the relevant financial year.
  - 5.2 That it was approved by Mr Boyden.
  - 5.3 When Mr Boyden approved that document, that he knew that it understated 'A' Limited's financial position.
  - 5.4 If he did not, that Mr Boyden should have known at the time he approved the document, that it understated 'A' Limited's financial position.
  - 5.5 That profit was reduced and as a result the tax was understated because adjustments were made to the accounts of 'A' Limited. The total amount of monies understated is £340,000.
6. The IC relied on the financial statements and tax returns submitted and filed as above and on correspondence passing between members of the LLP, contained in the bundle of documents submitted on behalf of the IC.
7. The IC called Mr 'E' to give oral evidence. He submitted three written statements as his evidence in chief and was cross-examined on behalf of Mr Boyden and his co-Respondents.
8. Mr 'E's evidence was to the effect that the LLP suffered from the recession from 2009, and was responsible for the cost of annuity payments for retired former partners. Turnover reduced by approximately 15% compared to the turnover of the previous separate practices which had merged to form the LLP. In March 2010, in addition to existing annuities for ex-partners of one of the previous practices, the LLP accepted further financial responsibility, in the form of a 10 year annuity to another retiring partner, Mr 'G', which amounted to £150,000 per annum. In December 2011 the firm found itself unable to pay staff wages and partner drawings. The partners considered whether to put the business into formal administration or to continue to trade.

9. Additional funding for the LLP was made available by Messrs 'F', 'C', Boyden and 'D' who collectively owned in excess of 90% of the practice's equity. Mr 'E' provided £40,000 directly into the LLP while Mr 'C', Mr 'D' and Mr Boyden obtained a loan of £100,000 from a client of the LLP, which they personally guaranteed. The loan from the client was provided to 'A' Limited for onward lending to the LLP.
10. Mr 'E' states that he spoke to Mr 'C' on 8 October 2013 and asked Mr 'C' about the tax affairs of 'A' Limited and whether it had sufficient funds to meet tax liabilities. Mr 'C' replied that 'A' Limited had monies available for when HMRC wanted them. Mr 'E' states he found this an unsatisfactory response.
11. Mr 'E' states that on 9 October, 2013 he asked Mr 'F' whether 'A' Limited needed additional monies from the LLP to pay tax. Mr 'E' states that Mr 'F's response was that "A Limited's tax was their problem and he had nothing to do with it." This, and Mr 'C's response, caused Mr 'E' to look at 'A' Limited's accounts.
12. Mr 'E's review included 'A' Limited's accounts and corporation tax computations for the years ended 31 December 2010 to 2012. He identified inconsistencies in the information he reviewed. He reviewed the tax computation for 'A' Limited's 2012 accounts and did not understand why the chargeable tax liability was so low. The profit recorded in the financial statements was £97,115. He then compared the annual accounts of 'A' Limited with the LLP accounts and discovered a discrepancy between the profit share allocated from the LLP of £299,063 and the profit share disclosed in the accounts of 'A' Limited of £159,063. The profit share recorded in the accounts of 'A' Limited was lower by £140,000.
13. Mr 'E' reviewed entries in the nominal ledger of 'A' Limited and identified an adjustment of £140,000. Mr 'E' found journals which removed some of the profit share out of the income account and credited it to other creditors.
14. Mr 'E' also checked the 2011 'A' Limited accounts and found that the profit share allocated of £72,676 corresponded with the LLP accounts. However 'A' Limited's comparative figures, in the 2011 accounts, for 2010 suggested a lower profit than he expected. He compared the share of 2010 profit in the comparatives to the 2011 accounts with the filed 2010 Company accounts. He found that the share of profit in the comparative figures at £157,948 was £200,000 lower than the profit share of £357,948 disclosed in the 2010 Company accounts which were filed at Companies House in December 2010.
15. In summary Mr 'E' found that the profit share reported in the LLP partnership tax returns for 2010 and 2012 as profit share for 'A' Limited exceeded the reported income in 'A' Limited's tax return. He concluded that 'A' Limited had understated income by £200,000 during the year ended 31 March 2010, and a further £140,000 in respect of the year ended 31 March 2012. It appeared to Mr 'E' that corporation tax liabilities of at least £70,000 for 'A' Limited had been under declared to HMRC.
16. Mr 'E' said that the profit share in 'A' Limited's accounts for FY2011 agreed with the corporate member's profit share in the LLP's accounts for that year. Mr 'F' submitted the 2011 corporation tax return for 'A' Limited, whereas Mr 'C' submitted the C600 for FY2010 and Mr 'D' that for FY2012. This is confirmed by an electronic return, copied in the documentary evidence.

17. 'A' Limited approved its accounts for FYE 31 March 2010 on 22 December 2010 and filed abbreviated accounts signed by Mr 'C' and Mr 'D' at Companies House on 23 December 2010. Those accounts were consistent with the accounts of the LLP and both showed 'A' Limited received a profit share from the LLP of £357,948. The account showed that 'A' Limited made a net profit of £301,521.
18. The CT600 was filed nine months late and the tax computation filed showed "profit per financial statements" of £101,520, which was £200,000 less than the profit shown in 'A' Limited's original financial statements. The figure of £101,520 was shown in the amended accounts for 'A' Limited for FY2010 which accompanied the CT600. The amended accounts, however, were not sent to Companies House, which Mr 'C' described in his witness statement as a "clerical oversight on the part of the directors of 'A' Limited".
19. The differences arise out of a £200,000 provision, made against 'A' Limited's share of the profits of the LLP but the IC alleges that this provision was not clearly stated as such in the accounts and indeed is difficult to identify.
20. The filed accounts and tax return for the LLP for 2010 were not amended, despite the fact that the time limit for doing so had not yet expired.
21. Ms 'H' FCA, a forensic accountant and partner in 'I' LLP gave expert evidence on behalf of the IC and noted that the original 'A' Limited financial statements for FY2010 shows a debt owed to 'A' Limited of £129,800, representing the profit share owed to 'A' Limited by the LLP. In the amended FY 2010 financial statements, this debt was eliminated.
22. The original 'A' Limited financial statements for FY2010 show creditors due after more than one year of £654,894; whereas the amended balance sheet shows a figure of £725,094, an increase of £70,200. Most of this increase represents the balance of the provision of £200,000.
23. The original 'A' Limited financial statements for FY2010 shows creditors falling due within one year of £406,003, whereas the amended FY2010 balance sheet shows a figure of £367,891. The difference of £38,112 represents the reduction in corporation tax liability as a result of the reduction in 'A' Limited's anticipated profit share from the LLP.
24. The adjustment described above had the effect of reducing 'A' Limited's profit after tax for FY 2010 by £162,888. This reduction is reflected in the P/L reserves figure which was reduced from £649,960 to £488,071.
25. Similarly, the IC relies on the mismatch between the LLP accounts and 'A' Limited's accounts for FY2012: the LLP's P/L account for FY2012 shows a profit share payable to 'A' Limited of £299,063; 'A' Limited's P/L account for the same period shows profit share income from the LLP of only £159,063, a difference of £140,000.
26. 'A' Limited made a further £140,000 provision in 2012 which, as in the 2010 accounts, is not easy to identify in the accounts. Ms 'H' stated that "the additional provision of £140,000 in FY2012, together with the [2010] provision of £200,000 is likely to have been reflected in the creditors falling due after more than one year figure of £636,177. The financial statements do not show a breakdown of this figure and therefore I cannot state this definitively".

27. Despite Mr Boyden's claims that he left the preparation of 'A' Limited's accounts and tax returns and the LLP's tax returns to his partners, the evidence shows that he was present at Executive Board and partnership meetings, on 19 January, 2011, 19 December, 2012 and 22 January 2013, at which management accounts and, at the meeting of 19 December 2012 and 22 January 2013, year-end accounts for 2012 were discussed.
28. Mr Boyden also submitted letters to the ICAEW signed by him jointly with Mr 'C', on 29 November 2013, with Mr 'C' and Mr 'D', on 30 December 2013, over his "pp" signature on 31 March 2014 and on behalf of all three partners on 20 June, 2014, setting out and expanding on the reasons for the provisions made in the 'A' Limited accounts for 2010 and 2012. In summary, he explains, in the letter dated 29 November 2013, that,

*"due to the material uncertainties existing relating to the trading position of [the LLP as at January 2012] and the significant levels of cross-guarantees in place with the practice should it have failed, amended accounts with a provision of £200k to reflect these uncertainties were included ...'J', on behalf of the annuitants, who along with the Bank are by far the largest creditors of the practice, wrote to us [in August, 2012] effectively withdrawing their support from the business stating that in their opinion, it should be into administration and pre-pack...This created considerably more uncertainty and the provision was reviewed and increased by £140k in order to present a true and fair view of the balance sheet at 1 March 2012".*

29. Further detailed explanations were offered in a letter to ICAEW dated 22 January 2014, signed by Mr Boyden together with Mr 'C' and over a "pp" signature for Mr 'D', which states,

*At the end of December [2011] we found ourselves unable to pay staff wages and partner drawings and we became extremely worried as to the viability of the business ....Whilst we did not go into a major investigation of the prior periods ... we believed that part of the allocated profits in respect of WIP made to the Company ['A' Limited] were overstated. We took this into account when making the provisions.*

*We also considered that there was the real possibility that billings were raised in Romford in advance of work being down. Whilst we had no proof of this we felt that the extent of the cash outflows arising in the accounting year to 31 March 2011 were disproportionate to the position in March 2010 and that there was likely to be a timing difference between the two years. We took this into account when allocating provisions to the 2010 period.*

*We then assessed the impact of the business going into administration. We concluded that there was a real danger of this despite our best efforts and commitment to ensure its survival ...this would have severely affected the value and recoverability of WIP as well as the collection of debtors resulting in substantial trading losses which would have been allocated to the company resulting in the repayment of profits previously allocated".*

30. In the letter to ICAEW dated 31 March 2014, the £200,000 provision in the amended 2010 accounts was divided up as follows:

*Overstatement of WIP: £65,000 provision “for the company’s share of the overstatement of £100k” and £135,000 provision “to reflect the uncertainties surrounding the LLP business and the impact it would have on the Company at the time ... there was a serious threat that the business would be put into administration, the impact of this would be that the debts and WIP would have been substantially unrecoverable leading to losses arising in the partnership. The company would have then effectively have had an overdrawn account with the LLP leading it to have to repay funds”.*

31. In a letter to ICAEW dated 18 November, 2015, which Mr Boyden did not sign, Mr ‘C’ advanced, for the first time, the impact on the accounts of the lease of the Chelmsford office which had been assigned to the LLP when the partnership commenced trading in January 2009, at an annual rent of £90k per annum plus service charge costs of £40k, business rates of £36k and ancillary costs of £15k per annum. The economic market rent at the time was, he said, £66k per annum and was assigned by Mr ‘E’ ”without regard to the fact that this was an onerous lease at above market rental with unutilised space that wasn't needed in a depressed market”. He claimed this was “a catastrophic error and one that was principally responsible for pushing the practice to the brink of administration”.
32. The allegation relating to the onerous lease was supported by Mr Boyden. He explained that an office on the third floor of the Chelmsford offices had been occupied by a former partner, Mr ‘K’, who had stayed on as a consultant to the LLP and finally left the practice in April, 2010. Thereafter, although other members of staff occupied about 200 square feet of the 1500 square feet of the third floor, one room, a board room, was used for occasional meetings up until 2013, essentially the third floor was vacant, awaiting being let and of no practical advantage to the LLP.

### **Defence case**

33. Mr Boyden tendered a written witness statement in evidence and gave oral evidence to the tribunal. He stated that he was not involved with the preparation of the accounts or the CT600s. He claimed that Mr ‘C’ and Mr ‘F’ were responsible for preparing the accounts and CT600s for ‘A’ Limited and Mr ‘E’ and Mr ‘F’ were responsible for preparing the accounts for the LLP and the partnership tax return.
34. With hindsight, he says, he wished that he had paid more attention to the accounts which were being submitted rather than relying on the work of his colleagues. He accepted that he should have scrutinized the documents and sought to question the bases of the figures in the accounts accordingly. He trusted his colleagues to prepare the accounts accurately and was overwhelmed, he said, with running the largest department in the business, as Head of Corporate Services.

35. Mr Boyden stated that he had always been very “hands-on” and recalled approaching Mr ‘F’, the Finance Partner, asking him for his WIP list and being told “You’re the only person to ask” for it. He looked at the items which appeared to be high and asked Mr ‘F’ to write them off as he was unable to do this himself. He said he raised the issue of WIP at board meetings and assumed his colleagues were doing the same as he was. However he said he was not involved in the LLP’s accounts.
36. He says in his witness statement that he did not remember anyone challenging the accounts or raising any concerns. “The only thing that was ever discussed was personal expenses ... the accounts were simply not the main concern at the time”.
37. He said he “now believe[s] that was a fundamental flaw in the way the accounts were prepared and scrutinised. When debtors were assessed there was little or no assessment of their recoverability and when WIP was assessed, there was no assessment of what was ultimately billable ... There was therefore a huge amount of unrecoverable WIP that was not recognised and there was no recognition of the onerous lease on the Chelmsford premises”.
38. [Private]
39. Mr Boyden also described a “rift” between Mr ‘E’ and him and his colleagues at the Chelmsford office.
40. In cross-examination, Mr Boyden said he was not told why or how the profits were overstated or that the partners were anticipating possible administration. He did think there was a very real possibility that the business would fail. He described it as a “horrible, horrible time”.
41. Mr Boyden called a character witness, Mr ‘L’, and put in evidence the written statements of five other character witnesses. The Tribunal had regard to their evidence.

### **Conclusions and reasons for decision**

42. The Tribunal had regard to the corporation tax returns (CT600) for ‘A’ Limited’s financial years 2010 and 2012 and the financial statements for ‘A’ Limited for FY2012, submitted on 18 December 2012. The Tribunal was satisfied on the basis of Mr Boyden’s own evidence that he had approved the submission of those returns and statements. The evidence indicated a discrepancy between the figures for taxable profits contained in the ‘A’ Limited CT600s for FYs 2010 and 2012 and in the financial statements submitted to Companies House for 2012 compared, in the case of the 2010 tax return, with the profit shown on the abbreviated accounts filed at Companies House on 23 December 2012 and compared with the share of profit allocated from the LLP to ‘A’ Limited for the same period; and in the case of the 2012 accounts and CT600, compared with the share of profit allocated from the LLP to ‘A’ Limited for the same period.
43. In the case of the 2010 tax return, the taxable profit for the year was stated to be £200,000 lower than the profit shown on the abbreviated accounts filed at Companies House and the share of profit allocated from the LLP to ‘A’ Limited for the same period; in the case of the

2012 Accounts and CT600, the stated profit (and taxable profit) for the year was £140,000 lower than the share of profit allocated from the LLP to 'A' Limited for the same period.

44. The Tribunal had to decide whether, the returns and accounts were in fact understated. It is Mr Boyden's case that they were not and in fact reflected the "fundamental flaw in the way the LLP's accounts were prepared and scrutinised." In any event, he maintains he had nothing to do with their preparation or scrutiny.
45. It is common ground that there was no explanation for the "provisions" in either the 2010 returns or the 2012 accounts and that the provisions in both were not transparent and are not at all easy to identify, provisions being made against various lines of the accounts without consideration of any necessary disclosures to HMRC, nor UK GAAP. There is no contemporary evidence documenting the calculations made in respect of either the 2010 or 2012 provisions.
46. The Tribunal was not satisfied that the LLP had abandoned or ceased to receive economic benefit from the third floor of the Chelmsford building until after the relevant periods for the 2010 and 2012 accounts.
47. The Tribunal found that the tax returns for FY2010 and 2012 and the accounts for FY2012 submitted on 28 December 2012 were understated.
48. The Tribunal considered Mr Boyden's protestations that he had distanced himself from the accounts and had not agreed to their submission. The Tribunal accepted the evidence regarding Mr Boyden's [private] during the period of the charges. The Tribunal took into account the evidence that Mr Boyden was present at Board meetings when the finances of the partnership were discussed and he saw management accounts and annual financial statements for the period in question on a regular basis. The Tribunal found his memory loss highly selective. The Tribunal had to decide, on a balance of probabilities, whether Mr Boyden knew or should have known, at the time the financial statements were submitted, of the contents of those statements and that they understated the true position of 'A' Limited's accounts. Mr 'E's letter to the ICAEW of 10 October 2013, setting out his complaint against Mr Boyden and Mr 'C', states, "I have also included Jeremy Boyden as part of this complaint since as a director and a shareholder of the company I cannot think he was not aware of what has been done ...".
49. The Tribunal found, on a balance of probabilities that Mr Boyden knew the detail of the financial statements that were submitted for FY2010 and FY2012 and that they were understated.
50. The Tribunal found that Heads of Complaint 1(a), 2(a) and 3(a) were proved.

### **Matters relevant to sanction**

51. The Tribunal had regard to the Institute's *Guidance on Sanctions*, effective from 1 April 2019. The Tribunal took the view that the misconduct proved under Heads 1a, 2a and 3a fell within

Section 17 of the Guidance, Misconduct as a Company Director, and, within that section, under paragraph d (Approval of defective accounts).

52. The Tribunal took the view that in respect of all the Heads of Complaint proved against Mr Boyden and taking into account all the circumstances of the case which had been brought out in evidence and in submissions made in the hearing they fell within the “less serious” category.
53. The Tribunal took into account a number of mitigating factors in Mr Boyden’s case –
- The matter had reached the Investigations Committee principally as a result of a very acrimonious partnership dispute between the Chelmsford partners and Mr ‘E’ who was the complainant.
  - No clients of the practice had been affected and there was no resulting loss to the Revenue as the partnership had subsequently made good the shortfall in corporation tax.
  - Of the three Respondents, Mr Boyden had played the least significant role.
  - [Private]
  - The Tribunal took into account the statements in support of Mr Boyden submitted by him to the Tribunal and his good character.

### **Sentencing Order and Costs**

54. The Tribunal ordered Mr Boyden to be reprimanded and to pay a Category E fine of £3,000.
55. The IC claimed costs in the sum of £151,070,75 to be split equally between the three Respondents.
56. The Tribunal had careful regard to a schedule of means provided by Mr Boyden.
57. Counsel for the Respondents contended that the costs claimed were substantially inflated, notably in relation to the pre-tribunal work carried out by Institute staff, external counsel instructed by the Institute and by the expert witness, Ms ‘H’.
58. The Tribunal had careful regard to the sums claimed and the reductions already made by the IC in the schedule of costs but nevertheless determined that some of the sums claimed, particularly the 191 hours claimed by Ms ‘H’ in her preparation and report writing at £445 an hour, were excessive as was the claim for some of the preparatory work carried out over five years leading up to the Tribunal hearing. The Tribunal determined that overall, £120,000 was a more appropriate figure to order the Respondents to pay. Accordingly, it awarded the IC that sum, and ordered Mr Boyden to pay one third as his contribution to the Institute’s costs namely, £40,000.

## **Decision on publicity**

58. The Tribunal directed that a record of this decision shall be published and Mr Boyden shall be named in that record but directed that all matters relating to the details of Mr Boyden's health shall not be published.

**Chairman**

Mrs Rosalind Wright QC

**Accountant Member**

Mr Martin Ward FCA

**Non Accountant Member**

Mr Nigel Dodds

**017680**

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4. Mr Ian Harris FCA of  
Chelmsford, United Kingdom

**A tribunal of the Disciplinary Committee made the decision recorded below having heard a formal complaint on 4-8 February 2019 and 20-21 May 2019**

**Type of Member**                      Member

**Head of Complaint 1**

A. On or before 6 January 2012 Mr I Harris FCA approved the submission of form CT600 for 'A' Limited for the year ended 31 March 2010, when he knew the form understated the financial position of 'A' Limited because it stated taxable profit for the year to be £200,000 lower than the profit shown in the abbreviated accounts filed at Companies House on 23 December 2010.

or in the alternative

B. On or before 6 January 2012 Mr I Harris FCA approved the submission of form CT600 for 'A' Limited for the year ended 31 March 2010, when he should have known the form understated the financial position of 'A' Limited because it stated taxable profit for the year to be £200,000 lower than the profit shown in the abbreviated accounts filed at Companies House on 23 December 2010.

**Head of complaint 2**

A. On or before 18 December 2012, Mr I Harris FCA approved the financial statements of 'A' Limited for the year ended 31 March 2012 when he knew the accounts understated the financial position of 'A' Limited, as profit for the year was £140,000 lower than the share of profit allocated from 'B' LLP for the same period.

or in the alternative

B. On or before 18 December 2012, Mr I Harris FCA approved the financial statements of 'A' Limited for the year ended 31 March 2012 when he should have known the accounts understated the financial position of 'A' Limited, as profit for the year was £140,000 lower than the share of profit allocated from 'B' LLP for the same period.

**Head of complaint 3**

A. On or before 28 March 2013 Mr I Harris FCA approved the submission of form CT600 for 'A' Limited for the year ended 31 March 2012, when he knew the form understated the financial position of 'A' Limited as taxable profit for the year was £140,000 lower than the share of profit allocated from 'B' LLP for the same period.

B. or in the alternative

C. On or before 28 March 2013 Mr I Harris FCA approved the submission of form CT600 for 'A' Limited for the year ended 31 March 2012, when he should have known the form understated the financial position of 'A' Limited as taxable profit for the year was £140,000 lower than the share of profit allocated from 'B' LLP for the same period

## **Head of complaint 4**

On 28 December 2011, Mr I Harris FCA accepted a loan of £100,000 from a client of 'B' LLP when he had failed to have any or sufficient regard to section 280 Objectivity of the Code of Ethics

If proven, the member may be liable to disciplinary action under Disciplinary Bye-law 4.1a for heads of complaint 1A, 2A, 3A and 4 and under Disciplinary Bye-law 4.1b for heads of complaint 1B, 2B and 3B

Disciplinary Bye-law 4.1a states: "if 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."

Disciplinary Bye-law 4.1b states: "if 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".

### **Hearing date**

4-8 February, 20 – 21 May 2019

### **Previous hearing date(s)**

None

### **Pre-hearing review or final hearing**

Final Hearing

### **Complaint found proved**

1a, 2a, 3a; and 4 (by admission)

### **Sentencing order**

Reprimand and to pay a fine of £10,000 and ordered to pay costs of £40,000

### **Parties present**

Ian Harris, represented by Fiona Horlick of counsel instructed by Julie Norris of Kingsley Napley LLP  
Also present were co-Respondents, Mr 'M' and Mr 'D', represented by Fiona Horlick of counsel instructed by Julie Norris of Kingsley Napley LLP

The Investigation Committee of ICAEW was represented by Mark Vinall of counsel, instructed by Jessica Sutherland-Mack of the ICAEW legal department.

**Hearing in public or private**

The hearing was in public

**Documents considered by the tribunal**

The tribunal considered the documents contained in the Investigation Committee's (IC's) bundle (together with 4 volumes of evidence submitted by Kingsley Napley LLP on behalf of the Respondent and two co-Respondents, Mr 'M' and Mr 'D', together with additional evidence served immediately before and during the first day's tribunal hearing.

**Heads of Complaint:**

**1-3 denied  
4 admitted.**

**Background**

1. 'A' Limited was a corporate member of the limited liability accountancy partnership 'B' LLP ("the LLP") carrying on business in Essex. Its sole source of income was its share of the profit of the LLP
2. At all material times, Mr Harris was joint managing partner (with Mr 'E') of the LLP and a director/shareholder of 'A' Limited, based in Chelmsford. Mr 'M' and Mr 'D' were members of the LLP and directors/shareholders of 'A' Limited, based in Chelmsford. Mr 'E' was at the LLP's Romford office.
3. The timeline in relation to the filing of 'A' Limited's financial statement and corporation tax returns ("CT600s") was as follows:
  - 3.1 On 23 December 2010, 'A' Limited filed abbreviated financial statements for FY2010 at Companies House.
  - 3.2 On 24 December, 2011, 'A' Limited filed abbreviated financial statements for FY2011 at Companies House.
  - 3.3 On 6 January 2012, Mr Harris submitted 'A' Limited's CT600 corporation tax return for FY2010.
  - 3.4 On 18 January 2012 Companies House received undated amended accounts for 'A' Limited for FY2011.
  - 3.5 On 2 November 2012, Mr 'F', Finance Partner of the LLP, submitted 'A' Limited's CT600 corporation tax return for FY2012.
  - 3.6 On 18 December 2012, 'A' Limited filed abbreviated accounts for FY2012 at Companies House.
  - 3.7 On 28 March 2013, Mr 'D'; submitted 'A' Limited's CT600 corporation tax return for 2012.
  - 3.8 On 20 January 2014, 'A' Limited filed amended abbreviated financial statements for 2010, dated 16 January 2012.

4. The profit shares due to 'A' Limited as reported in the LLP's financial statements for FY2010 and FY2012 were higher than the profit share income reported by 'A' Limited in the corresponding year by £200,000 and £140,000 respectively. The filed Company financial statements for FY2010 reported profits that were £200,000 higher than A' Limited's corporation tax return (CT600) for FY2010.
5. In December 2011, the LLP found itself unable to pay staff wages and partner drawings. The members agreed to inject additional funding into the firm. As part of this effort, Mr Harris arranged a loan to 'A' Limited from Mr 'N' who was a long-standing client of his; his company, 'O' Limited had been an audit client of the LLP. The LLP had audited 'O' Limited's accounts for 2009 and did so for the year ended 30 June 2011. The Independent Auditor's Report was signed by Mr Harris on 12 December 2011, just over two weeks before the loan agreement was signed.
6. Mr Harris has admitted Head of Complaint 4 which relates to this loan.

### **The Investigation Committee's (IC's) case**

7. The IC sought to prove, in respect of the each of the three 'A' Limited documents, the CT600s for FY2010 and FY2012 and the abbreviated accounts for FY2012 –
  - 7.1 That it understated 'A' Limited's financial position for the relevant financial year.
  - 7.2 That it was approved by Mr Harris.
  - 7.3 When Mr Harris approved that document, that he knew that it understated 'A' Limited's financial position.
  - 7.4 If he did not, that Mr Harris should have known at the time he approved the document, that it understated 'A' Limited's financial position.
  - 7.5 That profit was reduced and as a result the tax was understated because adjustments were inappropriately made to the accounts of 'A' Limited. The total amount of monies understated is £340,000
8. The IC relied on the financial statements and tax returns submitted and filed as above and on correspondence passing between members of the LLP, contained in the bundle of documents submitted on behalf of the IC.
9. The IC called Mr 'E' to give oral evidence. He submitted three written statements as his evidence in chief and was cross-examined on behalf of Mr Harris and his co-Respondents.
10. Mr 'E's evidence was to the effect that the LLP suffered from the recession from 2009, and was responsible for the cost of annuity payments for retired former partners. Turnover reduced by approximately 15% compared to the turnover of the previous separate practices which had merged to form the LLP. In March 2010, in addition to existing annuities for ex-partners of one of the previous practices, the LLP accepted further financial responsibility, in the form of a 10 year annuity to another retiring partner, Mr 'G', which amounted to £150,000 per annum. In December 2011 the firm found itself unable to pay staff wages and partner drawings. The partners considered whether to put the business into formal administration or continue to trade.

11. Additional funding for the LLP was made available by Messrs 'E', Harris, 'M' and 'D' who collectively owned in excess of 90% of the practice's equity. Mr 'E' provided £40,000 directly into the LLP while Mr Harris and his co-directors of 'A' Limited, obtained a loan of £100,000 from a client of the LLP, which they personally guaranteed. The loan from the client was provided to 'A' Limited for onward lending to the LLP.
12. Mr 'E' states that he spoke to Mr Harris on 8 October 2013 and asked Mr Harris about the tax affairs of 'A' Limited and whether it had sufficient funds to meet tax liabilities. Mr Harris replied that 'A' Limited had monies available for when HMRC wanted them. Mr 'E' states he found this an unsatisfactory response.
13. Mr 'E' states that on 9 October, 2013, he asked Mr 'F' whether 'A' Limited needed additional monies from the LLP to pay tax. Mr 'E' states that Mr 'F's response was that "'A' Limited's tax was their problem and he had nothing to do with it." This, and Mr Harris's response, caused Mr 'E' to look at 'A' Limited's accounts.
14. Mr 'E's review included 'A' Limited's accounts and corporation tax computations for the years ended 31 December 2010 to 2012. He identified inconsistencies in the information he reviewed. He reviewed the tax computation for 'A' Limited's 2012 accounts and did not understand why the chargeable tax liability was so low. The profit recorded in the financial statements was £97,115. He then compared the annual accounts of 'A' Limited with the LLP accounts and discovered a discrepancy between the profit share allocated from the LLP of £299,063 and the profit share disclosed in the accounts of 'A' Limited of £159,063. The profit share recorded in the accounts of 'A' Limited was lower by £140,000.
15. Mr 'E' reviewed entries in the nominal ledger of 'A' Limited and identified an adjustment of £140,000. Mr 'E' found journals which removed some of the profit share out of the income account and credited it to other creditors.
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17. In summary Mr 'E' found that the profit share reported in the LLP partnership tax returns for 2010 and 2012 as profit share for 'A' Limited exceeded the reported income in 'A' Limited's tax return. He concluded that 'A' Limited had understated income by £200,000 during the year ended 31 March 2010, and a further £140,000 in respect of the year ended 31 March 2012. It appeared to Mr 'E' that corporation tax liabilities of at least £70,000 for 'A' Limited had been under declared to HMRC.
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26. The adjustment described above had the effect of reducing ‘A’ Limited’s profit after tax for FY 2010 by £162,888. This reduction is reflected in the P/L reserves figure which was reduced from £649,960 to £488,071.
27. Similarly, the IC relies on the mismatch between the LLP accounts and ‘A’ Limited’s accounts for FY2012: the LLP’s P/L account for FY2012 shows a profit share payable to ‘A’ Limited of £299,063; ‘A’ Limited’s P/L account for the same period shows profit share income from the LLP of only £159,063, a difference of £140,000.
28. ‘A’ Limited made a further £140,000 provision in 2012 which, as in the 2010 accounts, is not easy to identify in the accounts. Ms ‘H’ stated that “the additional provision of £140,000 in FY2012, together with the [2010] provision of £200,000 is likely to have been reflected in the creditors falling due after more than one year figure of £636,177. The financial statements do not show a breakdown of this figure and therefore I cannot state this definitively”.

## Defence case

29. Mr Harris argued that the ‘A’ Limited accounts for both 2010 and 2012 were not understated and represented a true and fair view of the accounts of ‘A’ Limited for those years and that the original accounts for 2010 of the LLP, signed by Mr ‘E’, were overstated and did not take account or make provision for a number of factors which, under FRS 12<sup>1</sup>, should have been included.

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<sup>1</sup> Paragraph 14 of Financial Reporting Standard 12 states:

When an entity has a present obligation (legal or constructive) as a result of a past event, it is probable that a transfer of economic benefits will be required to settle the obligation and a reliable estimate can be made of the amount of the obligation.

These were, he said, WIP, the treatment of debtors and an “onerous lease” of the LLP’s offices in Chelmsford.

30. He gave evidence at the hearing where he stated that he had asked Mr ‘F’, the Finance Partner, to make a provision in the ‘A’ Limited accounts and discuss it with the other partners. He had not made any amendment to the LLP accounts as he explained that trust had broken down between the Chelmsford partners and Mr ‘E’, in Romford, and “anything we put forward relating to the LLP could damage the LLP itself”.
31. Mr Harris sent a number of letters to the ICAEW, some jointly with Mr ‘M’ and Mr ‘D’, beginning on 29 November 2013 setting out and expanding on the reasons for the provisions made in the ‘A’ Limited accounts for 2010 and 2012. In summary, he explains that,

*“due to the material uncertainties existing relating to the trading position of [the LLP as at January 2012] and the significant levels of cross-guarantees in place with the practice should it have failed, amended accounts with a provision of £200k to reflect these uncertainties were included ...’J’, on behalf of the annuitants, who along with the Bank are by far the largest creditors of the practice, wrote to us [in August, 2012] effectively withdrawing their support from the business stating that in their opinion, it should be into administration and pre-pack...This created considerably more uncertainty and the provision was reviewed and increased by £140k in order to present a true and fair view of the balance sheet at 1 March 2012”.* (Letter from Mr Harris and Mr ‘M’ to ICAEW dated 29 November, 2013).

32. Further detailed explanations were offered in a letter to ICAEW dated 22 January 2014, signed by Mr Harris and Mr ‘M’ and over a “pp” signature for Mr ‘D’, which states,

*At the end of December [2011] we found ourselves unable to pay staff wages and partner drawings and we became extremely worried as to the viability of the business ....Whilst we did not go into a major investigation of the prior periods ... we believed that part of the allocated profits in respect of WIP made to the Company [‘A’ Limited] were overstated. We took this into account when making the provisions.*

*We also considered that there was the real possibility that billings were raised in Romford in advance of work being done. Whilst we had no proof of this we felt that the extent of the cash outflows arising in the accounting year to 31 March 2011 were disproportionate to the position in March 2010 and that there was likely to be a timing difference between the two years. We took this into account when allocating provisions to the 2010 period.*

*We then assessed the impact of the business going into administration. We concluded that there was a real danger of this despite our best efforts and commitment to ensure its survival ...this would have severely affected the value and recoverability of WIP as well as the collection of debtors resulting in substantial trading losses which would have been allocated to the company resulting in the repayment of profits previously allocated”.*

33. In a letter to ICAEW dated 31 March 2014, Mr Harris divided the £200,000 provision in the amended 2010 accounts as follows:

*Overstatement of WIP: £65,000 provision “for the company’s share of the overstatement of £100k” and £135,000 provision “to reflect the uncertainties surrounding the LLP business and the impact it would have on the Company at the time ... there was a serious threat that the business would be put into administration, the impact of this would be that the debts and WIP would have been substantially unrecoverable leading to losses arising in the partnership. The company would have then effectively have had an overdrawn account with the LLP leading it to have to repay funds”.*

34. In a letter to ICAEW dated 18 November, 2015, having received the IC’s draft Report, Mr Harris advanced, for the first time, the impact on the accounts of the lease of the Chelmsford office which had been assigned to the LLP when the partnership commenced trading in January 2009, at an annual rent of £90k per annum plus service charge costs of £40k, business rates of £36k and ancillary costs of £15k per annum. The economic market rent at the time was, he said, £66k per annum and was assigned to the partnership at the insistence of Mr ‘E’ *“without regard to the fact that this was an onerous lease at above market rental with unutilised space that wasn’t needed in a depressed market”*. He claimed this was *“a catastrophic error and one that was principally responsible for pushing the practice to the brink of administration”*.
35. The evidence in support of the allegation relating to the onerous lease was provided by Mr Harris and by Mr ‘M’ and to a greater extent by Mr ‘D’. They explained that an office on the third floor of the Chelmsford offices had been occupied by a former partner, Mr ‘K’, who had stayed on as a consultant to the LLP and finally left the practice in April, 2010. Thereafter, filing cabinets were kept on the third floor, Mr Harris and other members of staff occupied about 200 square feet of the 1500 square feet of the third floor, a desk was used from time to time by Mr ‘E’ when he visited the Chelmsford office and one room, a board room, was used for occasional meetings up until 2013. Mr Harris argued that essentially the third floor was vacant, awaiting being let and of no practical advantage to the LLP.
36. Mr ‘P’ FCA, of ‘Q’ LLP was called on behalf of the defence to give expert evidence about the lease. It was his opinion that the three conditions set out in FRS 12 had been met in respect of the third floor offices, as well as the cost of the rent of the property, which was reduced on a rent review in August 2012 to £66,000 p.a., and that therefore the lease amounted to an onerous contract and provision in respect of it should have been made in the 2010 accounts.
37. Mr Harris undertook a major recast of the accounts to provide a retrospective justification for the provisions. Mr Harris admits in his witness statement, that he did not *“undertake this exercise at the relevant time”*. His recast accounts make provision for an onerous lease, as well as a further discount of 10% for WIP in all departments of the LLP except for the Chelmsford Business Advisory department, where it is discounted by 50%; and *“a further general allowance of 50% of the remainder”* for Chelmsford debtors in 2010.
38. Both Mr ‘M’ and Mr ‘D’ gave evidence on their own behalf and in support of Mr Harris whose account of the preparation of the 2010 and 2012 accounts and the basis for making provisions they corroborated. They also gave evidence as to the unhappy atmosphere in the firm, caused, they claimed, by Mr ‘E’, which had a deleterious effect on the health of both of them.

39. Mr Harris called Mr 'R', former Chairman of the LLP who had chaired management committee meetings at the LLP but was unable to recall discussions on WIP or on "specific issues" in the accounts of the LLP. He and Mr 'S' of 'T' solicitors, of Chelmsford who was also called to give evidence, corroborated the evidence of Mr Harris, Mr 'M' and Mr 'D' as to the contentious and "testosterone-charged" atmosphere in the LLP, generated by the animosity between Mr 'E' on the one hand and the Chelmsford partners on the other. Mr 'R' likened it to "open warfare" and Mr 'S' said he had been threatened personally by Mr 'E' with a complaint to the SRA alleging a conflict of interest on his part when advising the LLP.

### **IC's evidence in rebuttal of defence relating to the onerous lease**

40. Ms 'H' made three statements, having read the witness statements and exhibits produced by Mr Harris and his co-Respondents and in response to the partners' evidence and Mr 'P's statement relating to the lease, gave her expert opinion to the effect that the third floor offices, albeit not fully occupied after Mr 'K's departure and before then, only partly occupied by Mr 'K' and members of LLP staff, did provide an economic benefit to the firm and therefore that the lease did not qualify as an onerous contract and provision should not have been made for it in the 2010 accounts.

41. Once the LLP had vacated the third floor the lease was potentially onerous in relation to the third floor. On the basis that the LLP abandoned the use of the third floor sometime during the year ending 31 March 2012, an onerous lease provision might have been included in the 2012 accounts and that provision might have been in the region of £171,145 according to Ms 'H's evidence. She comments "*Therefore, taking the FY2012 accounts of [the LLP] in isolation, Mr Harris's contention that the provision of £140,000 in the FY2012 accounts of [A' Limited] may be valid (indeed the provision of £140,000 is understated)*".

42. However, her opinion is predicated on the third floor having been abandoned before 31 March 2012. Mr 'E's evidence is that while the building was under-utilised, "*We continued using all three floors in Chelmsford to a greater or lesser extent until October 2012 when 'U' [another partner] left ... I agree that we only needed two floors, but we were using three*". It is further qualified by her opinion that "the FY2012 accounts of 'A' Limited already include a provision of £200,000 carried forward from FY2010. If this provision was not in fact required, because the profits in the FY2010 accounts of the LLP were not overstated, it should have been written back in the FY2012 accounts. The write back of the provision would have exceeded the overstatement of profits in the FY2012 accounts of the LLP arising from the failure to account for the onerous lease."

### **Conclusions and reasons for decision**

43. The Tribunal had regard to the corporation tax returns (CT600) for 'A' Limited financial years 2010 and 2012 and the financial statements for 'A' Limited for FY2012, submitted on 18 December 2012. The Tribunal was satisfied on the basis of Mr Harris's own evidence that he had approved the submission of those returns and statements. The evidence indicated a discrepancy between the figures for taxable profits contained in the 'A' Limited CT600s for FYs 2010 and 2012 and in the financial statements submitted to Companies House for 2012 compared, in the case of the 2010 tax return, with the profit shown on the abbreviated accounts filed at Companies House on 23 December 2012 and compared with the share of profit allocated from the LLP to 'A' Limited for the same period ; and in the case of the 2012 accounts and CT600, compared with the share of profit allocated from the LLP to 'A' Limited for the same period.

44. In the case of the 2010 tax return, the taxable profit for the year was stated to be £200,000 lower than the profit shown on the abbreviated accounts filed at Companies House and the share of profit allocated from the LLP to 'A' Limited for the same period; in the case of the 2012 Accounts and CT600, the stated profit (and taxable profit) for the year was £140,000 lower than the share of profit allocated from the LLP to 'A' Limited for the same period.
45. The Tribunal had to decide whether, irrespective of Mr Harris's intentions at the time the accounts were prepared, the returns and accounts were in fact understated. It is Mr Harris's case that they were not, and although his explanations were offered retrospectively and, in the case of the lease, very late in the day, that they justified the provisions made.
46. Mr Harris has sought to justify the reduced profit figures on the basis that they were "provisions", properly made to reflect items to which he and his partners had not had regard when preparing the original accounts submitted on 23rd December 2010, or in the LLP's accounts for FY2012. Mr Harris has given various explanations for the basis of these provisions, at different times since 2013, including the fear that the firm was about to go into administration, overstatement of WIP and writing off a percentage of debtors of the firm and, belatedly, that the firm was burdened with an onerous lease because of unused space on the third floor of its premises.
47. It is common ground that there was no explanation for the "provisions" in either the 2010 returns or the 2012 accounts and that the provisions in both were not transparent and are not at all easy to identify, the provisions being made against various lines of the accounts without consideration of any necessary disclosures to HMRC, nor UK GAAP. There is no contemporaneous evidence documenting the calculations made in respect of either the 2010 or 2012 provisions.
48. The Tribunal was not satisfied that the LLP had abandoned or ceased to receive economic benefit from the third floor of the Chelmsford building until after relevant periods for the 2010 and 2012 accounts.
49. The Tribunal was not convinced that the explanations advanced by Mr Harris were either sincere or that the reduction in the stated figures for profits in the 2010 or the 2012 returns and accounts were justified for the reasons he advanced. The Tribunal considered that a more likely explanation, as argued by the IC, for the action taken by Mr Harris and his partners to reduce the profits figure in both the 2010 and 2012 returns and accounts was to reduce or postpone the amount of corporation tax liability for 'A' Limited and thus avoid the need for them to provide funds to 'A' Limited with which to pay the corporation tax then due. The Tribunal considered that any "clawback" of monies that he and his partners had invested in the LLP that might be required in the event of administration or liquidation - a possibility to which Mr Harris refers in a letter to ICAEW of 31 March 2014, would be in any case a contingent liability which could not be made the subject of a provision in the accounts under FRS12.
50. It was clear not only from the Institute's evidence but also that called by the Respondents and given by Mr Harris himself that he was a, if not the prime mover in these matters and in full command of the actions carried out and the implications of them.
51. The Tribunal therefore found, on a balance of probabilities that the tax returns for FY2010 and 2012 and the accounts for FY2012 submitted on 28 December 2012 were understated. The Tribunal found Mr Harris's explanations regarding WIP, debtors and the lease unpersuasive. The Tribunal found that Mr Harris knew that the profit figures in those financial statements were understated.

52. The Tribunal found Heads of Complaint 1a, 2a and 3a proved. Mr Harris admitted Head of Complaint 4.

### **Matters relevant to sentencing**

53. The Tribunal had regard to the Institute's *Guidance on Sanctions*, effective from 1 April 2019. The Tribunal took the view that the misconduct proved under Heads 1a, 2a and 3a fell within Section 17 of the Guidance, Misconduct as a Company Director, and, within that section, under paragraph d (Approval of defective accounts).

54. The Tribunal considered the context of the misconduct admitted by Mr Harris under Head 4 (accepting a loan from a recent audit client) and considered there were mitigating features.

55. The Tribunal took the view that in respect of all the Heads of Complaint proved against Mr Harris and taking into account all the circumstances of the case which had been brought out in evidence and in submissions made in the hearing they fell within the "less serious" category.

56. The Tribunal took into account a number of aggravating factors in Mr Harris's case –

- Of the three Respondents in this case, Mr Harris had been the main protagonist;
- He had prepared the accounts and CT600s which included the disputed "provisions" together with Mr 'F';
- In relation to Head of Complaint 4, he had initially sought to mislead investigators as to the current audit status of the client from whom he accepted the loan for the LLP.

57. The Tribunal took into account the following mitigating factors -

- The matter had reached the Investigations Committee principally as a result of a very acrimonious partnership dispute between the Chelmsford partners and Mr 'E' who was the complainant.
- No clients of the practice had been affected and there was no significant resulting loss to the Revenue as the partnership had subsequently made good the shortfall in corporation tax.
- Mr Harris had no previous disciplinary record.
- Mr Harris had admitted the misconduct alleged under Head of Complaint 4.
- Mr Harris had done everything he could to keep the partnership going, preserve the jobs of his employees and to have regard to the interests of his clients.
- The Tribunal took into account the statements in support of Mr Harris submitted by him to the Tribunal.

### **Sentencing Order**

58. The Tribunal ordered Mr Harris to be reprimanded and to pay a Category C fine of £10,000.

59. In addition, the IC claimed costs in the sum of £151,070.75. The tribunal considered the representations on the IC's schedule of costs submitted by counsel for the Respondents, and the IC's response to those representations. It also had regard to a schedule of Mr Harris's means and the latest available financial statements of the LLP (now, Ltd).
60. The IC asked that the costs be split equally between the three Respondents. Counsel for the Respondents contended that the costs claimed were substantially inflated, notably in relation to the pre-tribunal work carried out by Institute staff, external counsel instructed by the Institute and by the expert witness, Ms 'H'.
57. The Tribunal had careful regard to the sums claimed and the reductions already made by the IC in the schedule of costs but nevertheless determined that some of the sums claimed, particularly the 191 hours claimed by Ms 'H' in her preparation and report writing at £445 an hour, were excessive as was the claim for some of the preparatory work carried out over more than five years leading up to the Tribunal hearing. The Tribunal determined that overall, £120,000 was a more appropriate figure to order the Respondents to pay. Accordingly it awarded the IC that sum, and ordered Mr Harris to pay one third as his contribution namely, £40,000.

### **Decision on publicity**

58. The tribunal directed that a record of this decision shall be published and Mr Harris shall be named in that record.

**Chairman**  
**Accountant Member**  
**Non Accountant Member**

Mrs Rosalind Wright QC  
Mr Martin Ward FCA  
Mr Nigel Dodds

**017679**

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