

THE DISCIPLINARY COMMITTEE
OF THE TAXATION DISCIPLINARY BOARD

TDB/2016/15

TAXATION DISCIPLINARY BOARD
(TDB)

v.

MR DAVID CONLAN CTA
(Membership Number 125508)

DECISION

INTRODUCTION:

1. The Disciplinary Tribunal sat on Friday 18 May, 2018 and Tuesday 10 July, 2018 at Artillery House, 11-19 Artillery Row, Victoria, London SW1P 1RT. The Tribunal was chaired by Mr Mark Ruffell (barrister) who was sitting with Mrs Sarah Brown (lay member) and Mr Brian Palmer (taxation and accountant member).
2. The presenter for the TDB was Mr Ben Smiley. Mr Conlan attended but was not represented. The Committee made necessary adjustments, including regular breaks, in the light of Mr Conlan's health condition.
3. The Committee had read and considered the case papers pages 1-358 and a skeleton argument from Mr Smiley dated 14 May 2018.

CHARGES:

4. Charge 1 (The "Clients' Money Charge"):
In breach of Rules 2.1, 2.2.4, 7.7.3, 7.7.4, 7.7.5 and/or 7.7.7 of the PRPG 2011, the Defendant failed:
 - (i) to take great care with client money and/or failed to ensure that client money was properly accounted for;

- (ii) to keep client money separate from money belonging to the firm, in a separate client account;
 - (iii) to have a client account, and so to comply with the conditions in Rule 7.7.4 in respect of that account;
 - (iv) did not pay client money received, immediately into the appropriate clients account, or to the client direct or otherwise as the client instructed; and/or
 - (v) did not pay client money (which exceeded £10,000) into a separate interest bearing account designated as that of the client.
5. Charge 1 was read to Mr Conlan. He denied 1(i), 1(ii) and 1(iii). He admitted 1(iv) in so far as the money was not paid as directed by the client. He admitted 1(v) in that the money was not paid into an account with the client's name but he did consider it to be a general client account.
6. Charge 2 (the "Professional Behaviour Charge"):
In breach of Rules 2.1, 2.6.1, 2.6.2, of the PRPG 2011, the Defendant:
- (i) failed to take due care in his conduct;
 - (ii) failed to take due care in all his professional dealings;
 - (iii) failed to uphold the professional standards of the CIOT as set out in the Laws of the CIOT;
 - (iv) performed his professional work and/or conducted his practice and/or business relationships improperly, inefficiently, negligently and/or incompletely to such an extent and/or on such number of occasions as was likely to bring discredit to himself, to the CIOT and/or to the members and/or any part of the membership and/or to the tax profession
 - (v) breached the Laws of the CIOT.
7. Charge 2 was read to Mr Conlan. He denied 2(i) and 2(ii). He admitted 2(iii). He admitted 2(iv) in so far as he accepted that he brought discredit on himself but he did not accept that he brought discredit to the CIOT or the profession as what took place was nothing to do with taxation advice. He admitted 2(v).
8. Charge 3 (the "Disciplinary Compliance Charge"):
In breach of Rules 2.1 and/or 2.9.2 of the PRPG 2011, the Defendant has failed to respond to correspondence from the TDB without delay.
9. Charge 3 was read to Mr Conlan. He admitted Charge 3.

BACKGROUND:

10. The Complainant, Mr David Tooth, was Director, 100% shareholder and employee of Apollo Associated Services (Europe) Limited [Apollo]. On 22 March 2010, the Complainant deposited £151,926 in a tax saving scheme with an offshore company named Montpelior (Trust and Corporate) Services Limited [Montpelior].
11. By a letter of engagement dated 10 September 2012, Mosaic Professional (Trustees) LLP [Mosaic] was engaged to provide Trustee services to Apollo. On 13 December 2012, Montpelior retired as Trustee and Mosaic was appointed as the new Trustee. At the time of the appointment, Mr Conlan was a Trustee of Mosaic and he, together with a third party, signed the Deed of Appointment on behalf of Mosaic. Since 24 November 2016, Mr Conlan had been the sole Trustee. By a letter dated 14 July 2014, Mosaic sent the Complainant a copy of the financial statements for the Trust for the period to cessation at 30 June 2014. Those financial statements, which were signed by Mr Conlan on behalf of the Trustee recorded a distribution to be made, following settlement with HMRC, of £74,680 (the “Trust Funds”). The covering letter stated *‘We have advised HMRC that the Trust has now been closed and once we receive confirmation from HMRC that the Trust affairs are all settled the balance of the Trust funds will be issued to you.’* No distribution of the Trust Funds to the Complainant had been effected, despite numerous requests from the Complainant, his accountant and his solicitors for this to be done.
12. By email on 22 September 2014, Mr Conlan wrote to Mr Paul Adams (the Complainant’s accountant) stating inter alia: *‘I am hopeful that we will be in a position to make a distribution by the end of October at the latest... By way of reassurance, I am attaching an email from the solicitor holding funds on our behalf...’* The attached email referred to by Mr Conlan was dated 10 September 2014 and was from John Healy of Healys LLP (“Healys”) to Mr Conlan, stating *‘I am required by my auditors to confirm the amount of monies that are being held in escrow for your various clients. The current sum is £245,000.’*
13. On 3 December 2014, Mr Conlan emailed Mr Adams, stating inter alia: *‘I put a lump of money into a solicitors escrow account a while ago, without giving the solicitor a detailed breakdown of the relevant clients. I am working through this with the solicitor to get it properly allocated and repaid... I now realise that was a fairly dim thing to do but it felt sensible at the time. The aim of this email is to let you know we are looking at things, not ignoring the matter. I will continue to send updates as matters*

progress.’ On 4 December 2014, Mr Adams replied by email, stating ‘*Please can you give me an indication of the time scales, so that I can advise our client. Better still if you could advise our client directly -I am sure he would appreciate that.*’ There was no response received from Mr Conlan.

14. On 4 March 2016, Mr Conlan emailed Mr Adams apologising for the delay, and seeking to explain the failure to transfer the Trust Funds for over a year due to his illness in 2015. The email further stated: ‘*...the overall audit is almost finished and I will be able to give you a full update in a few days -I know I have said that before. Can we agree that you give me until the end of next week to provide you with a full explanation of where we are up to. I know my service has been significantly less than perfect, less than acceptable in fact, and I can only apologise again and give a solemn promise to not breach the proposal above. One last chance?*’
15. The Complainant instructed solicitors, Baker Law LLP [BLL]. On 25 May 2016, BLL wrote to Mosaic requesting that it responds with details as to the location of the Trust Funds. There was no response received from Mr Conlan. On 1 July 2016, BLL wrote to Mosaic requesting payment by Mosaic to the Complainants of the Trust Funds. No response was received from Mr Conlan.
16. The Complainant subsequently instructed DMH Stallard, which sent a final notice to Mr Conlan demanding payment of the Trust Funds by 1 September 2016. On 1 September 2016, Mr Conlan emailed DMH Stallard stating: ‘*In my capacity as trustee, I am preparing a detailed response to your correspondence on behalf of the trustees. I would request a short extension to, say, close of play Monday 5 September.*’ Mr Conlan did not send any response by 5 September 2016 or on any date thereafter. As a result, a Complaint Letter was sent to the TDB.

MR CONLAN’S EVIDENCE:

17. Mr Conlan gave lengthy and detailed evidence to the Committee. He explained that in 2010 he was employed as a director of Montpelior (UK) which was a UK subsidiary of a company registered in the Isle of Man. Montpelior (UK) went into liquidation and the subsequent investigation into what had happened to the company caused him significant stress, leading, he believed, to his later health condition.

18. Mr Conlan explained that he set up Mosaic and the company took on staff and business that had previously been with Montpelior. In 2014, one of the Trustees resigned suddenly and the other Trustee resigned in 2016. Throughout the period he was running Mosaic. In 2013, he saw a medical practitioner in relation to his health. In 2014, he suffered from a number of different health conditions which worsened in 2015 and 2016 and required medical treatment. He explained that having received treatment he was now able to work three half days per week.
19. Mr Conlan told the Committee that when one of the Trustees had resigned in 2014, he put most of the Trusts' funds in a client account with Healys solicitors. However, he was later to concede that the Complainant's money had never been placed in the Healys solicitors' account. Mr Conlan stated that he thought that the Complainant's money had been in Mosaic's Barclays Bank Client Account. He later conceded that he knew that the money was not now in that account as the account had a very small balance. Mr Conlan had not examined the bank statements for the Barclays Bank client account to see whether the money had ever been in that account, and if it had been how and when it had been withdrawn.
20. Mr Conlan's attention was drawn to accounting documents prepared by Mosaic that set out the funds available for distribution on 30 June 2014. Those documents stated that the sum of £75,303 was 'cash at bank.' Mr Conlan did not know whether these documents were accurate at the time that they were created even though they had been signed by him on behalf of the Trustees. He stated that he had examined Mosaic's finances and was able to show that the two Trustees who had resigned owed it £71,842.11. He did not provide further information as to how he came to this conclusion or how it might be linked to the disappearance of money that ought to have been in a client account. He did not accuse anyone of withdrawing the money from any account, but had instructed solicitors to bring legal proceedings against the former partners involved but due to a misunderstanding, that had not yet been done. He stated that the first time that he discovered that the money was missing was in the period late 2017 to early 2018.
21. In cross-examination, Mr Conlan accepted that he was unable to properly account for the money and that he had not taken great care of the money. Mr Conlan asserted that when in correspondence he had suggested that the money was in the account at Healys Solicitors, then this was what he genuinely believed at the time. He accepted that the money had never

been in an account at Healys Solicitors. He stated that he set himself high standards of professional conduct but that he had fallen short of those standards. Mr Conlan accepted that his dealings with TDB had fallen short of what was expected.

TDB'S SUBMISSIONS ON CHARGES:

22. Mr Smiley on behalf of the TDB, submitted that Mr Conlan had never provided the Complainant with the Trust Funds of £74,680 or satisfactorily explained where those funds were. Mr Smiley submitted that Mr Conlan had conceded that he had failed to take great care with client money. He submitted that Mr Conlan was in breach of the specified Rules of the PRPG in respect of his treatment of the Trust Funds. Mr Conlan was responsible for knowing where the funds were and for their distribution. He was not able to state where those funds were, even after an opportunity of 4 years. Mr Smiley relied on the correspondence between Mr Conlan and the TDB since September 2016, where he had failed to respond properly to TDB and had repeatedly asked for adjournments to prepare his case, yet no document had been received from him setting out his case.

MR CONLAN'S SUBMISSIONS ON CHARGES:

23. Mr Conlan accepted that his conduct had fallen short of the expected standards. He stated that this may have been due to his medical condition. He claimed to have found the missing money.

DECISION ON CHARGES:

24. The Committee considered all the evidence that it had heard and the submissions made by the parties. The Committee had regard to the professional standards expected of a Member. The Committee reminded itself that the burden of proving the charges was on the TDB and that the TDB had to satisfy the Committee on the balance of probabilities that a charge was proved. The Committee made allowance in Mr Conlan's favour that he was not represented, and therefore his submissions may have been less comprehensive than a legal representative.
25. The Committee noted that Mr Conlan had not been able to say when the funds had been in Mosaic's bank accounts or when they had disappeared. The Committee did not accept that Mr Conlan had first noticed that the funds had disappeared in late 2017 to early 2018. The Committee considered that it must have been apparent to Mr Conlan that the funds were not readily to hand when he first replied to correspondence from the Complainant in September 2014. Thereafter, the Committee concluded that Mr Conlan had deliberately failed to investigate where the funds

were. His explanations from September 2014 onwards were at best guesses and at worst an attempt to put off the discovery that the funds were missing. Either way, his conduct fell far short of what was expected of a tax advisor.

Charge 1(i):

26. The Committee noted that Mr Conlan had admitted in his evidence that he had failed to take great care with client money and had failed to ensure that client money was properly accounted for. As there was no clear explanation for where the money was, the Committee was satisfied that Charge 1(i) was proved.

Charge 1(ii):

27. The Committee noted that Mr Conlan did not know where the money was, and wherever it was, it was not by Mr Conlan's own admission in a separate client account. Accordingly, the Committee was satisfied that Charge 1(ii) was proved.

Charge 1(iii):

28. The Committee considered whether the TDB had proved whether Mr Conlan had failed to have a client account and had failed to comply with the conditions of Rule 7.7.4 in respect of that account. The Committee had regard to Mr Conlan's evidence that he had a Barclays Bank client account and a client account with Healys Solicitors. The Committee considered that TDB had failed to satisfy the Committee that Mr Conlan did not hold these client accounts and that they did not comply with Rule 7.7.4. Accordingly, the Committee found Charge 1(iii) not proved.

Charge 1(iv):

29. The Committee noted that Mr Conlan had accepted, when the charges were read and in his evidence, the second part of this alternative allegation, that he did not pay the client money to the client as the client instructed. Accordingly, the Committee were satisfied that Charge 1(iv) was proved.

Charge 1(v):

30. The Committee noted that Mr Conlan had accepted when the charges were read that he had not paid client money into a separate interest bearing account designated as that of the client as recommended in Rule 7.7.7. Accordingly, the Committee were satisfied that Charge 1(v) was proved.

Charge 2(i):

31. The Committee noted Mr Conlan's evidence that he accepted that he had failed to take due care in his conduct. The Committee considered the overall state of the evidence and Mr Conlan's inability to account for client money and his lack of effort in trying to find the money. The Committee was satisfied that Charge 2(i) was proved.

Charge 2(ii):

32. The Committee noted that Mr Conlan had in his correspondence attempted to give explanations for the money and had stated that he would discover its whereabouts swiftly. The Committee considered that these comments when made had no evidential basis. Mr Conlan had made claims that were factually inaccurate and which he could not or would not achieve. In the Committee's view this was a failure to take due care in his professional dealings and accordingly, the Committee found Charge 2(ii) was proved.

Charge 2(iii):

33. The Committee noted that Mr Conlan admitted when the charge was read that he had failed to uphold the professional standards of the CIOT as set out in the Laws of the CIOT. The Committee was satisfied from the evidence as well as from the admission that Charge 2(iii) was proved.

Charge 2(iv):

34. The Committee noted that Mr Conlan had accepted that he had brought discredit on himself but not on CIOT or the members of the tax profession. The Committee considered on the facts in the case, that Mr Conlan's membership of CIOT meant that there was a public expectation that he would uphold the standards that accord with membership. In the Committee's view, Mr Conlan's behaviour brought not only discredit to himself but also on the CIOT and on members of the tax profession. Accordingly, the Committee found Charge 2(v) proved.

Charge 2(v):

35. The Committee noted that Mr Conlan had accepted when the charge was read that he had breached the Laws of the CIOT. The Committee was satisfied that Charge 2(v) was proved.

Charge 3:

36. The Committee noted that Mr Conlan had accepted when the charge was read and in evidence that he had failed to respond to correspondence from the TDB without delay. Accordingly, the Committee found Charge 3 proved.

ADJOURNMENT:

37. The Committee decided on 18 May 2018, following its decision on the facts and having regard to Mr Conlan's health condition, to adjourn the hearing to a further date to be agreed by the parties through correspondence. The Committee subsequently resumed the hearing on 10 July 2018.

SUBMISSIONS ON SANCTION:

38. Mr Smiley drew the Committee's attention to the TDB's Indicative Sanctions Guidance and the categories of complaint. He submitted that Charge 1 related to Client Monies and the guideline starting point was one of expulsion. He submitted that Charge 2 related to a Failure to Take Due Care and the guideline starting point was one of censure. He submitted that Charge 3 related to a Breach of Bye-Law or Regulations and the guideline starting point for a failure to cooperate with a disciplinary investigation was one of expulsion. In addition he submitted that the charges also touched on Competence, Inadequate Professional Service and Ethical Conduct. Mr Smiley placed reliance on R. (Williams) v. Police Appeals Tribunal [2016] EWHC 2708 (Admin) to submit that personal mitigation could be given limited weight when a Disciplinary Committee considered the appropriate sanction.
39. Mr Conlan accepted that the charges were serious but urged the Committee to make no greater finding than one of Censure. He submitted that he had admitted many of the parts of the charges. He stated that the charges did not accuse him of more serious allegations of dishonesty and that there was no accusation that he had made a personal gain from the loss suffered by the Complainant. He stated that he had been left by the other two Trustees to take responsibility for the loss. He stated that he had no previous regulatory history with an unblemished 27 years of membership. He submitted that his health condition had impinged on his ability to deal with the TDB, but that since the hearing dates were set he had co-operated fully. Mr Conlan apologised for his conduct.
40. Mr Conlan further submitted that he was currently engaged as a consultant in a supportive arrangement that took account of his health condition. He was concerned about his work prospects should the Committee consider expulsion. Mr Conlan relied upon the correspondence provided to the Committee by Caroline Schofield, Sue Smith and Professor Graeme Yorston. In response to a question from the Committee, Mr Conlan made it clear that he had not identified where or when the money had gone and had taken no actual steps to recover it. He

had not contacted the Complainant directly since the last hearing to discuss how they could recover their money or ever given them an account of what he now thought had happened to it.

DECISION ON SANCTION:

41. The Committee had regard to the Indicative Sanctions Guidance and sought to weigh up the need for public protection against the interests of Mr Conlan. The Committee had regard to the public interest which included the protection of members of the public, maintaining public confidence in the profession and upholding proper standards of conduct.
42. The Committee considered how much weight should be placed on Mr Conlan's health condition as mitigation. The Committee noted that the medical evidence placed before the Committee by Mr Conlan dated from 2016 and there was no contemporaneous medical evidence aside from Mr Conlan's own evidence as to his health when the money disappeared. The Committee considered that, in the light of its finding above that *'his explanations from September 2014 onwards were at best guesses and at worst an attempt to put off the discovery that the funds were missing,'* these explanations could not be linked to his health condition. Accordingly, the Committee would give limited weight to Mr Conlan's health condition as personal mitigation in line with R. (Williams) v. Police Appeals Tribunal [2016] EWHC 2708 (Admin).

Charge 1:

43. The Committee had regard to the guidance in relation to Client Monies and considered that Mr Conlan had failed to properly account for monies held on behalf of the Complainant, there were serious failings in the administration of the trust and he had failed to repay client monies in accordance with the terms of the agreement. The Committee considered that the following were aggravating factors, namely the failure to promptly deal with the matter once notified, there had been a loss to the client and the sum had been lost for a lengthy period of time. The Committee considered that the following were personal mitigating factors, namely Mr Conlan's previous good regulatory history, his current good work record, his health condition and his partial admissions to the charges.
44. The Committee considered that Mr Conlan had been aware of the money being missing since September 2014 yet in his evidence he had made it

clear that he did not know when it had disappeared from the Trust because he had not examined the relevant bank accounts. The Committee considered that Mr Conlan should have 'left no stone unturned' in his investigation of where the Complainant's money had gone. Instead, he had steadfastly failed to investigate the loss of the money on behalf of the Complainant and had never given a straightforward explanation to the Complainant. In the Committee's view, such behaviour was fundamentally incompatible with the standards expected of a member.

45. The Committee considered that taking No Further Action, making an Order to Rest on the File, issuing a Warning or Ordering an Apology were insufficient sanctions for the seriousness of the charge. The Committee considered that the failings in the way client monies had been handled clearly fell outside the examples given in the guidance for relatively minor errors for which a censure would be appropriate. The Committee considered that Mr Conlan's lack of appreciation of the seriousness of his failure to properly account for client money which was demonstrated by his continued failure to take any active steps to find the money or to communicate with the client over efforts to trace it, meant that a suspension would be wholly inadequate to reflect the seriousness of the charge and to protect the public.
46. The Committee considered that Mr Conlan's conduct undermined public confidence in the profession. Accordingly, the Committee considered that the only appropriate sanction for such a serious failure to look after client money and a failure to try to recover it was one of expulsion.

Charge 2:

47. The Committee considered the guidance on a Failure to Take Due Care. The Committee considered that there had been a failure to take due care in relation to the Complainant's money and interests and to respond appropriately to the Complainant's concerns. The Committee considered that the following were aggravating factors, namely the period of time that loss had occurred and the size of the loss. The Committee considered that the following were personal mitigating factors, namely his previous good regulatory history, his current good work record, his health condition and his partial admissions to the charges.
48. The Committee considered that taking No Further Action, making an Order to Rest on the File, issuing a Warning or Ordering an Apology

were insufficient sanctions for the seriousness of the charge. The Committee considered that in accordance with the guidance a censure would ordinarily be appropriate but noted that there were significant aggravating factors in this case. The Committee considered that Mr Conlan's lack of appreciation of the seriousness of his failure to properly account for client money which was demonstrated by his continued failure to take any active steps to find the money or to communicate with the client over efforts to trace it, meant that a suspension would be wholly inadequate to reflect the seriousness of the charge and to protect the public.

49. In the light of the fact that Mr Conlan had steadfastly failed to take any remedial action on behalf of the Complainant, the Committee considered that this was a serious departure from the standards expected of a member.

50. The Committee considered that Mr Conlan's conduct undermined public confidence in the profession. As a consequence, the Committee considered that the only appropriate sanction was one of expulsion.

Charge 3:

51. The Committee considered the guidance on Breaches of Bye-Laws or Regulations. The Committee noted the lack of co-operation with the TDB during the investigation stage. The Committee did not consider that there were any aggravating factors. The Committee considered that the following were mitigating factors, namely his previous good regulatory history, his current good work record, his health condition and his partial admissions to the charges.

52. The Committee considered that taking No Further Action, making an Order to Rest on the File, issuing a Warning or Ordering an Apology were insufficient sanctions for the seriousness of the charge. The Committee noted that the guidance had a guideline starting point of expulsion. However, the Committee considered that Mr Conlan's health condition may have played a part in his non-compliance with the duties expected of him. Accordingly, the Committee considered that the appropriate sanction was one of censure.

COSTS:

53. Mr Smiley applied for costs in the sum of £10,970.45.

54. Mr Conlan did not oppose the application for costs and accepted that the amount of costs applied for were reasonable. He asked to pay by instalments.

55. The Committee had regard to the TDB's Guidance on Awarding Costs. The Committee noted that its power to award costs was set out in Regulation 27 and was discretionary. The Committee considered that it was right and proper in the light of its findings that Mr Conlan should pay the TDB's costs. The Committee examined the schedule of costs and considered that the amount applied for was reasonable. The Committee determined that it was fair and proportionate to award costs against Mr Conlan in the sum of £10,970.45. The Committee considered that any application made by Mr Conlan to the TDB to pay by instalments over a reasonable period of time, should be considered favourably.

PUBLICITY:

56. Mr Conlan applied for the Committee to direct that its decision and reasons should not be published as he was concerned about the adverse effect publication would have upon his employment and reputation.

57. The Committee had regard to the TDB's Guidance on the Publication of Disciplinary and Appeal Findings. The Committee noted that ordinarily any disciplinary finding or order made against a member will be published in accordance with Regulation 28. The reasons for publication were to provide reassurance that the public interest was being protected by the TDB and to demonstrate to the public, which includes the complainant and the member, that the proceedings took place in an open, fair and transparent way. The Committee noted that it had a discretion not to publicise its decision and reasons but only when there were wholly exceptional circumstances. The Committee did not consider that any adverse effect upon Mr Conlan's employment or reputation amounted to wholly exceptional circumstances. Indeed, the Committee considered that these were the potential consequences in most cases and the public interest in publicising the decision and reasons significantly outweighed the potential harm caused to Mr Conlan's employment or reputation.

EFFECTIVE DATE:

58. This decision will take effect in accordance with Regulations 20.9 and 21.1 of the Taxation Disciplinary Scheme Regulations 2014.

MARK B. RUFFELL
(Chairman)
10 July 2018