

THE DISCIPLINARY TRIBUNAL
OF THE TAXATION DISCIPLINARY BOARD

TDB/2018/30
TDB/2018/32
TDB/2018/37
TDB/2019/18

TAXATION DISCIPLINARY BOARD
(TDB)

Presenter

v.

MR PHILIP ATHERTON (CTA)
(Membership Number 136757)

Defendant

DECISION
(25.09.2019)

INTRODUCTION:

1. The Disciplinary Tribunal sat on Wednesday 25 September, 2019 at 4, New Square, Lincolns Inn, London. The Tribunal was chaired by Mr Mark Ruffell (barrister) who was sitting with Mr David Hards (CIOT member) and Ms Penny Griffith (lay member). The TDB was represented by Mr Ben Smiley (Counsel). Mr Philip Atherton did not attend. The Clerk to the Tribunal Mr Nigel Bremner and the transcriber Ms Alex Colbourne were also in attendance. The Tribunal had read and considered the case papers pages 1-353.
2. The Tribunal was satisfied that Mr Atherton had been given sufficient notice of the hearing in accordance with Regulation 14.1(a) of the Taxation Disciplinary Scheme Regulations 2014.

APPLICATION FOR AN ADJOURNMENT

3. On 23 September 2019, Mr Atherton informed the TDB that: *'I am not in a good place from a mental health position at the moment and cannot cope with preparing for or attending the hearing. I would request an adjournment. I am seeing my doctor who I expect to obtain help from so that I can attend the hearing.'* He was requested to provide medical evidence to state that he was unfit to attend the hearing. On 24 September 2019, Mr Atherton replied to that request stating: *'that is going to prove difficult in the short time available. I can send you my prescription for the drugs that I am on to assist me with my anxiety and depression. However in the likely ever [sic] that an adjournment is not granted, I Set [sic] out my submissions on the various cases. I am not going to attend as I cannot cope with the stress and anxiety.'* Mr Atherton went on to state: *'the stress of being left to deal with folium as a whole has caused me to take a job at a lower grade than I used to be able to handle and to be put on drugs to relieve my anxiety and help me sleep. I have been told that this could take 2-3 years.'* Mr Atherton sent TDB a photograph of a packet of sertraline with a prescription dated 23 September 2019 in his name to take one tablet daily. He also provided a link to the NHS website explaining sertraline.
4. Mr Smiley, on behalf of TDB, opposed the application to adjourn. The evidence adduced is inadequate to suggest that he is unfit to attend. Mr Atherton had also conceded that his explanation for not attending was inadequate. He had also provided whatever submissions he would provide. His failure to engage had been a concern. There was no evidence that an adjournment would secure his attendance or further explanations from him.
5. The Tribunal had regard to Regulation 19.1 of the Taxation Disciplinary Scheme Regulations 2014 and the points set out in the decision in Picton v CPS [2006] EHWc 1106 (Admin) at para 9: The Tribunal noted that Mr Atherton was given notice of the hearing by way of a letter dated 6 August 2019. He had been further contacted by email about the hearing on 17 August 2019 and 12 September 2019 yet there had been no response from him until 23 September 2019, two days before the hearing. The Tribunal noted that there seemed to be an inconsistency between having a longstanding medical condition that prohibited his ability to attend a hearing, and his failure to mention it before 23 September 2019. In addition, he had stated that he was working. The Tribunal considered that Mr Atherton had sufficient time to obtain medical evidence to suggest that he was unfit to attend, yet none had been provided. The Tribunal did not consider that the taking of sertraline at 1 tablet a day, prescribed on 23 September 2019, was sufficient evidence to suggest that Mr Atherton was unfit to attend the hearing.

6. In addition, the Tribunal noted that one of the allegations dated back to 2017 and that there was a need for the allegations to be dealt with expeditiously. Mr Atherton had not given an estimate for when the hearing could take place if it was adjourned, nor that he wished to call evidence that could not be given in his absence. Mr Atherton had provided some written submissions in relation to the allegations.
7. The Tribunal was not satisfied that Mr Atherton was medically unfit to attend the hearing. Accordingly, the Tribunal refused the application to adjourn.

PROCEEDING IN ABSENCE

8. Mr Smiley applied for the Tribunal to proceed in Mr Atherton's absence.
9. The Tribunal had regard to Regulations 17.3 and 17.4 of the Taxation Disciplinary Scheme Regulations 2014 that permit a hearing to proceed in the absence of a Defendant if the Tribunal is satisfied that notice of the hearing has been served on the Defendant. The Tribunal had regard to the principles laid down in R. v. Jones (Anthony William) [2001] EWCA Crim 168 by Rose L.J.: '*A defendant has, in general, a right to be present at his trial...Those rights can be waived, separately or together, wholly or in part, by the defendant himself. They may be wholly waived if, knowing, or having the means of knowledge as to, when and where his trial is to take place, he deliberately and voluntarily absents himself...*' The Tribunal considered that Mr Atherton was properly notified of the hearing and was aware that the hearing may proceed in his absence.
10. The Tribunal noted that Mr Atherton had written that '*I am not going to attend as I cannot cope with the stress and anxiety.*' In the light of the Tribunal's decision regarding an adjournment, and its finding that there was insufficient evidence to suggest that Mr Atherton was unfit to attend the hearing, the Tribunal considered that Mr Atherton had made a deliberate decision not to attend. Mr Atherton had made written representations concerning the charges and he had not stated that he required further time to prepare his defence. The Tribunal considered that any potential unfairness caused by his absence was balanced by the fact that the Tribunal had copies of Mr Atherton's written submissions. The Committee also considered that the nature and seriousness of the case and the age of some of the complainants meant that it was in the public interest for the case to be dealt with expeditiously.

11. The Tribunal determined to proceed in Mr Atherton's absence.

CHARGES:

12. Charge 1 (The "Cownden Conduct Charge")

In breach of Rules 1.6, 1.7, 2.4.1, 2.6.1 and/or 2.6.2 of the PRPG 2011 and/or Rules 1.6, 1.7, 2.4.1, 2.6.2 and/or 2.6.3 of the PRPG 2018, the Defendant:

- (a) Failed to act with reasonable care and skill, honesty, integrity, impartiality and professionalism;
- (b) Acted act in such a way as to bring the CIOT into disrepute, or in a way which would harm the reputation or standing of CIOT;
- (c) Failed to carry out his professional work with proper regard for the technical and professional standards expected;
- (d) Failed: (i) to uphold the professional standards of the CIOT and ATT as set out in the Laws of the CIOT and ATT; and/or (ii) to take due care in his professional conduct; and/or (iii) to take due care in his professional dealing;
- (e) (i) Performed his professional work, or conducted his practice or business relationships, or performed the duties of his employment improperly, inefficiently, negligently or incompletely to such an extent or on such number of occasions as to be likely to bring discredit to himself, to the CIOT or to the tax profession; and/or (ii) breached the Laws of the CIOT or ATT; and/or (iii) conduct himself in an unbecoming, unlawful or illegal manner, including in a personal, private capacity, which tends to bring discredit upon him and/or may harm the standing of the profession and/or the CIOT.

13. Charge 2 (The "Guinn Conduct Charge")

In breach of Rules 1.6, 1.7, 2.4.1, 2.6.1 and/or 2.6.2 of the PRPG 2011 and/or Rules 1.6, 1.7, 2.4.1, 2.6.2 and/or 2.6.3 of the PRPG 2018, the Defendant:

- (a) Failed to act with reasonable care and skill, honesty, integrity, impartiality and professionalism;
- (b) Acted act in such a way as to bring the CIOT into disrepute, or in a way which would harm the reputation or standing of CIOT;
- (c) Failed to carry out his professional work with proper regard for the technical and professional standards expected;
- (d) Failed: (i) to uphold the professional standards of the CIOT and ATT as set out in the Laws of the CIOT and ATT; and/or (ii) to take due

care in his professional conduct; and/or (iii) to take due care in his professional dealing;

- (e) (i) Performed his professional work, or conducted his practice or business relationships, or performed the duties of his employment improperly, inefficiently, negligently or incompletely to such an extent or on such number of occasions as to be likely to bring discredit to himself, to the CIOT or to the tax profession; and/or (ii) breached the Laws of the CIOT or ATT; and/or (iii) conduct himself in an unbecoming, unlawful or illegal manner, including in a personal, private capacity, which tends to bring discredit upon him and/or may harm the standing of the profession and/or the CIOT.

14. Charge 3 (The “Patel Conduct Charge”)

In breach of Rules 1.6, 1.7, 2.4.1, 2.6.1 and/or 2.6.2 of the PRPG 2011 and/or Rules 1.6, 1.7, 2.4.1, 2.6.2 and/or 2.6.3 of the PRPG 2018, the Defendant:

- (a) Failed to act with reasonable care and skill, honesty, integrity, impartiality and professionalism;
- (b) Acted act in such a way as to bring the CIOT into disrepute, or in a way which would harm the reputation or standing of CIOT;
- (c) Failed to carry out his professional work with proper regard for the technical and professional standards expected;
- (d) Failed: (i) to uphold the professional standards of the CIOT and ATT as set out in the Laws of the CIOT and ATT; and/or (ii) to take due care in his professional conduct; and/or (iii) to take due care in his professional dealing;
- (e) (i) Performed his professional work, or conducted his practice or business relationships, or performed the duties of his employment improperly, inefficiently, negligently or incompletely to such an extent or on such number of occasions as to be likely to bring discredit to himself, to the CIOT or to the tax profession; and/or (ii) breached the Laws of the CIOT or ATT; and/or (iii) conduct himself in an unbecoming, unlawful or illegal manner, including in a personal, private capacity, which tends to bring discredit upon him and/or may harm the standing of the profession and/or the CIOT.

15. Charge 4 (The “Curry Conduct Charge”)

In breach of Rules 1.6, 1.7, 2.4.1, 2.6.1 and/or 2.6.2 of the PRPG 2011 and/or Rules 1.6, 1.7, 2.4.1, 2.6.2 and/or 2.6.3 of the PRPG 2018, the Defendant:

- (a) Failed to act with reasonable care and skill, honesty, integrity, impartiality and professionalism;
- (b) Acted act in such a way as to bring the CIOT into disrepute, or in a way which would harm the reputation or standing of CIOT;
- (c) Failed to carry out his professional work with proper regard for the technical and professional standards expected;
- (d) Failed: (i) to uphold the professional standards of the CIOT and ATT as set out in the Laws of the CIOT and ATT; and/or (ii) to take due care in his professional conduct; and/or (iii) to take due care in his professional dealing;
- (e) (i) Performed his professional work, or conducted his practice or business relationships, or performed the duties of his employment improperly, inefficiently, negligently or incompletely to such an extent or on such number of occasions as to be likely to bring discredit to himself, to the CIOT or to the tax profession; and/or (ii) breached the Laws of the CIOT or ATT; and/or (iii) conduct himself in an unbecoming, unlawful or illegal manner, including in a personal, private capacity, which tends to bring discredit upon him and/or may harm the standing of the profession and/or the CIOT.

16.Charge 5 (The “Failure to Respond without Unreasonable Delay Charge”)

In breach of Rules 2.13.2 and/or 2.13.3 of the PRPG 2018, the Defendant:

- (a) Failed to respond to correspondence from the TDB without unreasonable delay.

The TDB’s refers to the matters stated above in Charges 1-4 and in particular:

- (1) The email sent by the TDB to the Defendant on 22 March 2019 in respect of Mr Patel’s complaint, to which no response was received.
- (2) The letter sent by the TDB to the Defendant on 28 May 2019 in respect of Mrs Cownden’s complaint, to which no response was received.
- (3) The emails sent by the TDB to the Defendant on 25 April 2019 and 24 May 2019, concerning the complaint of Mr James Guinn and Ms Lesley Guinn, to which no responses were received.
- (4) The letter sent by the TDB to the Defendant on 25 April 2019 and the email sent on 24 May 2019, concerning the complaint of Mr Curry, to which no responses were received.
- (5) The delay in any further substantive comment in respect of the TDB’s correspondence, until 19 July 2019, when the Defendant

provided submissions for the TDB's Interim Orders Panel, which were inadequate.

BACKGROUND TO CHARGE 1

17. Mr Atherton is a member of the CIOT and was at all material times a director of Folium Consulting LLP (Folium). Mrs Elizabeth Cownden received a flyer from Folium and then attended a free seminar provided by Folium with her husband. On 2 May 2018, a representative of Folium attended at the home of Mr and Mrs Cownden. Mr and Mrs Cownden agreed to receive tax advice from Folium and paid (by credit card) almost £4,000 for that advice. On 15 May 2018, having spoken to an accountant friend, Mr and Mrs Cownden decided to cancel that agreement. This was within the statutory 14 day 'cooling-off' period. Mrs Cownden was advised by Folium to return all documentation and the Directors would '*make a decision on refund.*' Mrs Cownden regularly telephoned Folium requesting the refund. She was repeatedly told by the receptionist that there was no one in the office. Folium's receptionist eventually advised Mrs Cownden to e-mail Mr Atherton which she did on 2 August 2018. Mrs Cownden never received a reply. On 20 November 2018, Mrs Cownden complained to the TDB regarding Mr Atherton's conduct. At the time of the complaint she was 77 and her husband was 85.
18. TDB wrote to Mr Atherton on 27 November 2018. On 12 December 2018, Mr Atherton replied to the TDB. He said that Mr and Mrs Cownden had '*instructed Folium to carry out this work as soon as possible – ie a fast track instruction waiving the 14-day cooling off period.*' He stated that Folium had taken legal advice regarding Mr and Mrs Cownden's refund request and were told '*we had an arguable case, but may have to repay the fee.*' However, he also stated that due to a lack of funds, Folium did not make the refund payment. The reason he had failed to respond to Mrs Cownden's email of 2 August 2018 was that '*the email was lost in the inbox.*' On 28 May 2019, the TDB wrote to Mr Atherton concerning the complaint of Mrs Cownden. No response was received to that letter.
19. Mr Atherton provided submissions for the TDB's Interim Orders Panel, on 19 July 2019. He reiterated that Mr and Mrs Cownden had waived the 14 day cooling-off period but he offered to make a refund. He further stated in correspondence dated 24 September 2019 that he understood the position of Mr and Mrs Cownden '*but have been told cannot do anything about it as that would be preferring a creditor.*' At no stage was a refund made by Folium, nor have any or all of the services been provided, whether

to a satisfactory standard or at all. Mr and Mrs Cownden received a refund of the sums paid to Folium by their credit card company.

20. The Tribunal assumed that Mr Atherton was a man of previous good character and that there was no previous regulatory history recorded against him. The Tribunal considered that his clean record was a fact which was relevant to both his credibility and the propensity for him to act in the way alleged.

SUBMISSIONS ON CHARGE 1

21. Mr Smiley submitted that there was an overall pattern for charges 1-4, where the complainants were elderly, had been charged money and had not received the services for which they had paid. In each of the complaints, it was Mr Atherton who was responsible for providing the tax advice and in each of the cases Mr Atherton had failed to engage with the clients once he knew the position concerning the failure to carry out work. Mr and Mrs Cownden were charged and paid for services which their accountant friend advised were inappropriate. Despite cancelling those services within the cooling-off period, no refund was provided in respect of those services. Mr Smiley submitted that there was no reference in the papers signed or given to Mr and Mrs Cownden to suggest that they had waived the cooling-off period.

22. Mr Atherton had responded to the charges in correspondence with the TDB dated 24 September 2019. He stated: *'Although I have supplied the information re the refund. This was from the file and I had no part in any decision. Perhaps the structure of Folium is best explained G Cook was managing director and in charge of the running of the company. He also headed the non-tax work (Powers of attorney/ wills and trusts). R C was the legal partner and responsible for the wills etc. Unfortunately Mr C left under a cloud leaving work to be paid for which he said he had done. This restricted the working capital and although we tried to raise investment it became obvious we had to stop trading in August 2018 A Osborne was the Finance Director and in day to day charge of payments in and out of the company I provided tax advice to the clients who wanted a report detailing their IHT position and what they needed to do to structure their estate to minimise IHT I had little to do with the management of the co. - we had people to do that and reports did not show that we were struggling*

The first time that I knew of the Cowndens position was when I received the notification of the complaint which was after the company ceased to trade because of being on an insolvent position and accessed their file. I had no input into their case as it had not got to a point when any tax consequences needed addressing. Cook had managed the case all along and had not informed me of the existence of the Cowndens. I [sic] cannot see how I could have handled their case. I understand their position, but have been told [sic] cannot do anything about it as that would be preferring a creditor.'

DECISION ON CHARGE 1

23. The Tribunal had regard to Rules 1.6, 1.7, 2.4.1, 2.6.1 and 2.6.2 of the PRPG 2011 and Rules 1.6, 1.7, 2.4.1, 2.6.2 and 2.6.3 of the PRPG 2018. The Committee noted the following wording that was written in marketing material that was provided to Mr Guinn (charge 2) beneath a picture of Mr Atherton: *'Folium Consulting LLP was established by Phillip Atherton and Andrew Osborne in 2010, and was originally set up as a small tax boutique. As the business grew. The Tax work crossed over more and more in the legal side of Estate Planning and private client work of a solicitor. Folium Consulting LLP had a strong working relationship with a regulated law firm based in Kent, where Gordon Stacey-Cook and Robert Cox worked. In January 2015, with the consistent growth of the business, Folium Consulting LLP was joined by Gordon Stacey-Cook and Robert Cox who brought their valuable and extensive legal expertise to the business. Now Folium Consulting LLP is able to offers its clients a fully comprehensive, in-house range of services from qualified experts.'* The Tribunal also noted that Companies House had recorded for Folium Consulting LLP that at 6 April 2016, Mr Atherton was registered as a *'person who has the right to exercise, or actually exercised, significant influence or control over the LLP.'*

24. The Tribunal considered that Mr Atherton had a responsibility for running the company and a duty to ensure that those who worked for the company dealt appropriately with clients. Furthermore, even if Mr Atherton was unaware of the request for refunding initially, he certainly was aware of the complaint by 27 November 2018 as a Director when the TDB had written to him. The TDB wrote to him again in May 2019 and he did not reply until July 2019. The Tribunal considered that Mr Atherton had failed from 27 November 2018 to the date of the hearing to engage with Mr and Mrs Cownden or put in place any measures to resolve their complaint. In the Tribunal's view, this was a continuation of the failure by his company to respond to their complaint over the previous months.

25. The Tribunal considered that it would have been Mr Atherton's responsibility to ensure that there was a properly functioning complaints procedure in place and that refunds were able to be repaid within a cooling off period. The Tribunal rejected Mr Atherton's claim that they had waived the cooling-off period as this was not supported in any of the written material provided to Mr and Mrs Cownden. The Committee were satisfied that Mr and Mrs Cownden had requested a refund within the cooling off period. In any event, Folium had not provided the work to Mr and Mrs Cownden, but had kept their money. The Tribunal considered that Mr Atherton as Director demonstrated a lack of professionalism as there was no properly functioning complaints procedure and this complaint was not dealt with appropriately.
26. The Tribunal considered that the subsequent delays by Mr Atherton in replying to the TDB's complaint and the failure to offer a refund to Mr and Mrs Cownden thereafter, knowing that the company had received the money 6 months' previously, and knowing that Folium had not done any work demonstrated a lack of care, honesty, integrity and professionalism. The Tribunal considered that such behaviour by Mr Atherton brought CIOT into disrepute and harmed the reputation of CIOT.
27. The Tribunal considered that as the work was cancelled by Mr and Mrs Cownden, there was not work for Mr Atherton to carry out with proper regard for the technical and professional standards expected.
28. The Tribunal found charges 1(a), 1(b), 1(d) and 1(e) proved. The Tribunal found charge 1(c) not proved.

BACKGROUND TO CHARGE 2

29. Mr James Guinn attended a Folium seminar in or around 2017 and engaged Folium to prepare lasting powers of attorney for him at that time, which it did. Mr James Guinn's late parents were named as the legal owners of 9 Legion Way, East Wittering, West Sussex which was a property that was occupied by Mr Guinn's son Mr Stephen Guinn and his wife Sara. Mr Guinn wished to ensure that the property passed to his son Mr Stephen Guinn and his daughter Ms Lesley Guinn. On 11 May 2018, Ms Lesley Guinn telephoned Folium, requesting that a representative attend a meeting to discuss the property.

30. On 14 May 2018, a representative of Folium attended on Mr James Guinn and Ms Lesley Guinn at their home. The representative informed Mr James Guinn and Ms Lesley Guinn *inter alia* that the property could be transferred into Mr James Guinn's name, for a cost of £200 plus VAT; the property should be placed in trust, at a cost of £3,474 (incl. VAT); if the £3,474 was paid for the trust, then Mr James Guinn would receive a High Net Worth report free of charge. Mr James Guinn paid the sum of £3,474 to Folium for the trust. This was recorded in a letter dated 14 May 2018 from the representative to Mr Guinn summarising the visit.
31. On 26 June 2018, Mr Atherton visited Mr James Guinn at his home. He advised Mr Guinn that the property should not be placed in the trust which had previously been recommended by the Folium representative (a discretionary trust) due to capital gains tax implications. He also recommended an alternative course of action, namely the use of a flexible reversionary trust, which would involve further cost to Mr Guinn.
32. On 12 July 2018, Ms Lesley Guinn wrote to Folium enclosing a cancellation notice on behalf of Mr James Guinn, requesting a refund '*as we both feel we have been misled*' as they had paid money for a trust then her father was being asked to pay more money for a different trust. Ms Lesley Guinn telephoned Folium repeatedly and received no response. On 31 July 2018, Ms Lesley Guinn wrote to Mr Atherton, setting out the background, and again requesting a refund.
33. On 4 September 2018, Folium wrote to Mr James Guinn, stating '*We have looked at the original contract and how much of the work had been done by us at the time of the termination...To fully allow our Operations Manager and Senior Partner time to review your case to see if and how much you would be entitled to with regards to a refund please allow up to 30 working days. If they make a decision prior you will be notified.*' On 10 September 2018, Ms Lesley Guinn replied to Folium. In her letter, she noted that her colleague had discovered that the price for a trust alone would have been £250 plus VAT. She reiterated her request for a refund but noted that if the property had been transferred into Mr James Guinn's name then he would be willing to pay the £200 plus VAT which had been quoted. She also stated that Mr James Guinn would also be willing to pay £250 plus VAT as a goodwill gesture for the trust even though he was not continuing with it.
34. On 9 October 2018, Folium replied to Ms Lesley Guinn stating: '*Due to circumstances beyond their control, the directors will place Folium into administration in the next couple of weeks. Please send all correspondence*

to Phillip Atherton at our office address, until such time a liquidator is appointed.’ It was further stated that the cost of a trust would not have been £250 plus VAT.

35. On 16 October 2018, Ms Lesley Guinn wrote to the Defendant reiterating the background and seeking the refund for her father. The letter further stated that *‘Companies House have just told me that Folium Consulting have not applied to go into liquidation so I find your letter of 9th October 2018 confusing.’*

36. On 24 October 2018, Ms Lesley Guinn complained to the TDB regarding Mr Atherton’s conduct. At the time of the complaint Mr James Guinn was 89. The TDB wrote to Mr Atherton informing him of the complaint. On 20 November 2018, Mr Atherton wrote to the TDB and stated that Ms Lesley Guinn was incorrect as regards what she had been told by Folium’s representative as to the High Net Worth Report (HNWR) being free of charge. He stated that Folium was going into administration *‘as soon as the Directors can raise the appropriate funds. In the intervening period we have tried to keep paid for work up to date, but a lack of employees has resulted in some delay* and that Folium would provide the work that had been paid for at no additional cost to the clients. On 18 December 2018, Ms Lesley Guinn reiterated that the Folium representative had stated that the HNWR *‘came free of charge,’* the property had not been transferred into Mr James Guinn’s name and the will had never been provided by Folium.

37. The TDB contacted Mr Atherton by email on 25 April 2019 and 24 May 2019, concerning the complaint of Mr James Guinn and Ms Lesley Guinn. No response was received to those letters. The Defendant eventually provided submissions for the TDB’s Interim Orders Panel, on 19 July 2019. He stated that he had given advice and was awaiting further instructions from Mr Guinn and Ms Guinn.

SUBMISSIONS ON CHARGE 2

38. Mr Smiley submitted that Mr Guinn had paid for services which were not performed (putting the Property into his name and the creation of a Trust) and the Defendant himself knew about this at the time as he had advised that the earlier recommended trust was inappropriate. When a refund was sought there were delays and inadequacies of response and the refund was refused in part on the basis that an HNWR had been provided. Mr Smiley highlighted that the documentation showed that the HNWR was free of charge as part of the overall package for which they had paid £3,474.00.

39. Mr Smiley stated that Mr and Mrs Guinn were left with the impression that Mr Atherton was simply asking for more money regardless of the money that they had already paid. He submitted that the letter of 4 September 2018, omitted to refer to the transfer of the property which was the first matter that ought to have been undertaken. The request for 30 days had the hallmarks of a business attempting to stall Mr and Mrs Guinn.
40. In correspondence with the TDB dated 24 September 2019, Mr Atherton stated: *'As I have set out - Mr Guinn's [sic] version is incorrect. Although I cannot say what the consultant said at the meeting - I doubt that he said what Mr Guinn recalls. - Mr Guinn was present at a seminar at which that charging process was explained, he also took away a brochure with the charging process outlined in detail. I have been asked what about a trust document that was part of the package? My recommendation was a Flexible Reversionary Trust which Mr Guinn needed to speak to a regulated advisor about. We recommended an advisor who I believe Mr Guinn saw but he refused to contemplate a trust. By refusing a trust, Mr Guinn put himself in the position of having a non package [sic] service. The individual items that he was supplied with came to above the package price. I have not been contacted by Mr Guinn. If he requires a plain discretionary trust I will happily get a solicitor to draft one.'*
41. The Tribunal had regard to Rules 1.6, 1.7, 2.4.1, 2.6.1 and/or 2.6.2 of the PRPG 2011 and/or Rules 1.6, 1.7, 2.4.1, 2.6.2 and/or 2.6.3 of the PRPG 2018. The Tribunal examined the invoice sent to Mr Guinn and noted that it said that the HNWR cost £0.00 as part of a wider package. Therefore, the Tribunal noted that the whole invoice was set up around a trust. It was Folium who recommended the first trust. The Tribunal considered that when Mr Atherton recommended a different Trust either he should have offered a refund and renegotiated a new fee or offered the same price or similar price for the different product. Instead, he sought to charge for the new trust being set up and offered no refund for the wrong advice. It was clear to the Tribunal that Mr Atherton was aware that Ms Leslie Guinn had sought a refund since 12 July 2018 as a result of his visit. However, Mr Atherton had failed to offer a refund or provide any evidence for carrying out significant work that would justify the payment that they had received. The Tribunal did not consider that there could be any need to delay consideration of paying part or all of the refund. Instead, in the Tribunal's view this had the hallmarks of deliberately delaying payment. The Tribunal considered that Mr Atherton had failed to act with reasonable care and skill

and integrity and professionalism. His actions brought CIOT into disrepute. The Committee considered that the technical advice given by Mr Atherton about a second trust may have been accurate.

42. The Tribunal determined that Charge 2 (a), 2(b), 2(d) and 2(e) were proved. The Tribunal found that Charge 2(c) was not proved.

BACKGROUND TO CHARGE 3

43. On 19 June 2018, Mr Atherton met with Mr and Mrs Patel. Following this meeting, Mr and Mrs Patel instructed Folium to: form a property investment LLP with both controlling Designated Members and non-controlling Ordinary Members; draft the Limited Liability Partnership Deed allocating entitlement to Capital in accordance with Mr and Mrs Patel's instructions; engage and liaise with an appropriate firm of solicitors in connection with the necessary transfers of properties by way of legal transfer or Declarations of Trust to the LLP; draft any necessary members minutes and assist Mr and Mrs Patel in the management of the LLP.
44. On 21 June 2018, Mr and Mrs Patel made payment of £3,000 to Folium. On 22 June 2018, Folium wrote to Mr and Mrs Patel confirming Folium's engagement to carry out the work specified above, Stating that Mr Atherton would be the person responsible for the day to day work on their case and that the total fees of £6,000 (incl. VAT) were payable in two instalments, of which the first instalment had already been made.
45. On 4 July 2018, Mr and Mrs Patel made a second payment of £3,000 to Folium. No further work was carried out by Mr Atherton and/or Folium. Mr Patel telephoned Folium's office and was told to contact Mr Atherton. Accordingly, Mr Patel telephoned Mr Atherton several times and left messages on his mobile. In or around November 2018, the Mr Atherton telephoned Mr Patel and promised he would be sort out the pending paperwork in a week and would arrange a meeting to complete the LLP process.
46. On 28 November 2018, Mr Patel emailed Mr Atherton stating: *'Further to your telephone conversation you were going to contact me in a week to complete LLP process it is almost 10 days. I haven't heard from you it is getting frustrating situation as you not even responding our phone calls it is extremely urgent to complete this process as it is almost end of 2018 and we have to submit tax returns and company accounts by January 2019....'*
47. On 30 November 2018, having not had further contact from Mr Atherton, Mr and Mrs Patel emailed him stating: *'We are Mr & Mrs D Patel would*

like to cancel the contract for setting up limited Liability Partnership as it is almost 6 months and work is not carried out it is very disappointing. I would like my fully paid fees £ 6,000.00 to be refunded on ASAP.'

48. On 3 December 2018, Mr Patel complained to the TDB regarding Mr Atherton's conduct.
49. By letter to the TDB dated 12 December 2018, Mr Atherton stated '*I have been told by Mr Patel that he has withdrawn his complaint.*' By email to the TDB dated 8 January 2019, Mr Patel stated '*...because of the holiday period we could not move forward with paperwork provided by Philip Atherton unfortunately there are still some enquires needs to be resolve we tried to contact Philip but can't get hold of him !! Unfortunately we have to keep the case on hold until our enquires are resolved.*'
50. By email to the TDB dated 22 March 2019, Mr Patel indicated that he wished to resurrect his complaint regarding Mr Atherton. It would appear that there had been some engagement by Mr Atherton with Mr and Mrs Patel but this had ended. On 22 March 2019, the TDB emailed Mr Atherton seeking a comprehensive response to Mr Patel's complaint by 5 April 2019. No response was received.
51. The TDB wrote to Mr Atherton by email on 25 April 2019 and 24 May 2019, concerning the complaint of Mr Patel. No response was received.
52. On 19 July 2019, Mr Atherton provided submissions for the TDB's Interim Orders Panel. He stated that: '*It may be that there is a small amount of work still to be done, at the Land Registry, but as far as I am concerned the work that the Patels paid for has been carried out.*'

SUBMISSIONS ON CHARGE 3

53. Mr Smiley submitted that Mr and Mrs Patel were charged and paid for services which were not performed to a satisfactory standard, either within a reasonable time, or at all and no refund had been paid. He stated that the attempts to contact Mr Atherton were met with silence or inadequate responses. He submitted that this was a serious failure in services and professionalism. Mr Smiley submitted that Mr Atherton's explanations did not deal with the position prior to insolvency.
54. In correspondence with the TDB dated 24 September 2019, Mr Atherton stated: '*I realise that the final part of Patel - the land registry is still*

outstanding. In mitigation I can only say that the collapse of Folium together with being the only person left to handle all of the outstanding affairs (cook having set up a parallel company) the Patels [sic] did not receive the final part of their service. I am dealing with this with a solicitor at the moment. I am apologetic for this.'

DECISION ON CHARGE 3

55. The Tribunal considered Rules 1.6, 1.7, 2.4.1, 2.6.1 and/or 2.6.2 of the PRPG 2011 and/or Rules 1.6, 1.7, 2.4.1, 2.6.2 and/or 2.6.3 of the PRPG 2018. The Tribunal considered that there was clear evidence that Mr Atherton had taken money from Mr and Mrs Patel and then not done the work, either at all or not satisfactorily. In the Tribunal's view, Mr Atherton had failed to respond appropriately when Mr and Mrs Patel raised concerns with him.
56. The Tribunal determined that Charges 3(a), 3(b), 3(c), 3(d) and 3(e) were proved.

BACKGROUND TO CHARGE 4

57. On 28 September 2017, Mr William Curry attended a Folium seminar. On 12 October 2017, a Folium representative attended at Mr and Mrs Curry's home. Mr and Mrs Curry instructed Folium to provide services, including drafting a HNWR, providing tax advice, and drafting wills and lasting powers of attorney. Mr Curry paid a cheque of £4,282 for those services (including VAT and disbursements).
58. On 13 October 2017, Folium wrote to Mr and Mrs Curry, purporting to set out the services to be provided and Folium's terms and conditions, and stating: *'In due course my colleague Philip Atherton CTA will arrange a convenient time to visit you in order to go through the report and receive your comments and any further advices. This can then lead to final positioning of your estate for the best outcome.'*
59. By letter dated 20 October 2017, Mr Curry wrote to Folium complaining of the inadequacy of the letter and enclosures from Folium.
60. In January 2018, Folium sent Mr and Mrs Curry an *'Estate Planning Report'* including a purported schedule of their assets. This was inaccurate as it included assets held within an LLP rather than owned personally by Mr and Mrs Curry. Accordingly, on 22 January 2018, Mr Curry sent Folium a revised draft.

61. On 12 February 2018, Folium wrote to Mr and Mrs Curry regarding a purported meeting in order for them to sign documents which had purportedly been drafted by Folium. Mr Curry telephoned Folium to explain that the wills had not been drafted; and no HNWR and/or tax advice had been provided (which would impact on the contents of the wills). Mr Curry considered that Folium appeared to be an ‘unprofessional shambles.’
62. On 20 February 2018, Folium wrote to Mr and Mrs Curry enclosing draft wills to consider. Mr Curry again telephoned Folium to explain that no HNWR and/or tax advice had been provided (which would impact on the contents of the wills) so the wills could not be signed.
63. On 23 February 2018, Folium wrote to Mr and Mrs Curry enclosing two copies of a HNWR. Folium stated that there was a two stage process, the first stage being the HNWR, and the second stage being the meeting with Folium’s tax team.
64. On 6 March 2018, Mr Curry wrote to Folium raising a query regarding inaccuracies in the valuation summary of the estates in the HNWR and further complaining that the draft wills had been sent prematurely as there had been no meeting with Mr Atherton and Folium’s tax team.
65. A few weeks later, Folium telephoned Mr Curry asking when the wills could be signed. Mr Curry reiterated that the wills would not be signed until tax advice had been provided. Mr Curry also asked when it would be possible to arrange the necessary meetings for Mr and Mrs Curry to be advised and the wills to be completed.
66. On 4 December 2018, Mr Curry discovered that Folium was to be struck off the register at Companies House and dissolved, and that the Defendant had incorporated a new company (Folium Estates Ltd) on 5 April 2018.
67. On 31 December 2018 Mr Curry wrote to Mr Atherton seeking information and requesting the services for which payment had been made to be completed by meeting with Folium’s tax team.
68. On 4 January 2019, Mr Curry wrote to Mr Atherton complaining of the closure of Folium’s website, the inactivity of Folium’s telephone numbers and the proposal for Folium to be struck off the register. He stated that he had no trust in Mr Atherton and Folium to satisfactorily conclude the

services for which they were engaged and he requested the return of the fees paid (£4,282).

69. On 6 February 2019, Companies House wrote to Mr Curry stating that it had stopped the striking off/dissolution of Folium until 7 August 2019.

70. On 10 April 2019, Mr Curry complained to the TDB regarding the Defendant's conduct.

71. On 25 April 2019 and 24 May 2019, the TDB wrote to Mr Atherton concerning the complaint made by Mr Curry. No response was received to that correspondence. On 19 July 2019, Mr Atherton provided submissions to the TDB's Interim Orders Panel. Mr Atherton blamed Gordon Stacey-Cook for what had happened and stated that he thought that matters had been concluded.

SUBMISSIONS ON CHARGE 4

72. Mr Smiley submitted that Mr Curry paid for services that were not performed to a satisfactory standard, within a reasonable time, or at all. No refund had been paid and attempts to contact Mr Atherton were met with silence or inadequate responses. Mr Smiley submitted that Mr Atherton's words in July 2019 were too late, considering that the engagement with Mr Currie commenced in October 2017.

73. On 26 May 2019, Mr Atherton wrote to TDB stating: *'I did have input on any HNWRs that were too complex for the member of staff who prepared them... Only when the HNWR went to the client, was the client contacted and a meeting arranged with me.'* In correspondence with the TDB dated 24 September 2019, Mr Atherton stated: *'In a similar vein the Currie case never got to a position when I became involved to provide tax services. So I did not know the details of the case until I received an abusive letter from Currie which I passed on to Mr Cool [sic]. Cook handled the case as managing director. In the past year I have been helping other folium clients and I am willing to help all including the above by providing any tax advice necessary and help them get documents finalised.'*

DECISION ON CHARGE 4

74. The Tribunal had regard to Rules 1.6, 1.7, 2.4.1, 2.6.1 and/or 2.6.2 of the PRPG 2011 and/or Rules 1.6, 1.7, 2.4.1, 2.6.2 and/or 2.6.3 of the PRPG 2018. The Tribunal considered that the HNWR seemed to be more complex

as the client had already undergone a degree of financial planning. Mr Atherton, by his admission, had stated that a more complex HMWR ought to have been passed on to him and that would have been from February 2018. From February 2018, Mr Curry had been in correspondence with Mr Atherton. The Tribunal considered that Mr Atherton had failed to deal with Mr Curry's concerns properly and instead ignored him. The Tribunal determined that this was a complete failure of Mr Atherton's professional duties. The Tribunal considered that it was improper of Mr Atherton to seek to blame his work colleagues instead of accepting responsibility himself.

75. The Tribunal found Charges 4(a), 4(b), 4(c), 4(d) and 4(e) proved.

BACKGROUND TO CHARGE 5

76. The TDB relied upon emails sent by the TDB to Mr Atherton on 22 March, 25 April and 24 May 2019 in respect of Mr Patel's complaint, to which no response was received. They relied on a letter sent by the TDB to Mr Atherton on 28 May 2019 in respect of Mrs Cownden's complaint, to which no response was received. They relied on emails sent by the TDB to Mr Atherton on 25 April and 24 May 2019 concerning the complaint of Mr James Guinn and Ms Lesley Guinn, to which no responses were received. They relied on a letter sent by the TDB to Mr Atherton on 25 April 2019 and the email sent on 24 May 2019, concerning the complaint of Mr Curry, to which no responses were received.

77. The TDB also relied on the delay in any further substantive comment in respect of the TDB's correspondence, until 19 July 2019, 23 September 2019 and 24 September 2019.

SUBMISSIONS ON CHARGE 5

78. Mr Smiley submitted that there was a failure to provide a prompt or indeed any response to the correspondence in March, April and May from the TDB, until 19 July 2019 and then two days before the hearing.

79. Mr Atherton had not provided any explanation for failing to respond promptly to TDB's correspondence.

DECISION ON CHARGE 5

80. The Tribunal had regard to Rules 2.13.2 and/or 2.13.3 of the PRPG 2018. The Tribunal considered that the delays in responding meant that Mr Atherton had not responded promptly.

81. The Tribunal found Charge 5 proved.

SANCTION

82. Mr Smiley drew the Tribunal's attention to the Sanctions guidance on competence, failing to take due care, inadequate professional service, client monies, ethical conduct, breaches of other byelaws and failure to cooperate.

83. Mr Atherton had not made any written submissions on sanction.

DECISION ON SANCTION

84. The Tribunal had regard to the sanctions guidance. The Tribunal considered that the following were aggravating factors: these were a series of repeated offences; they took place over a lengthy period of time; the complainants were vulnerable due to their ages; the business model of insisting for fees up front had benefited Mr Atherton and Folium and had harmed the clients; Mr Atherton had failed to take responsibility for his own actions and had instead blamed others; Mr Atherton had participated in a repeated pattern of causing delays, ignoring complaints and generally fobbing off the complainants; and delaying wills for the elderly has the potential to cause families serious problems and great upset, should illness or death intervene. The Tribunal considered that the value of the amounts kept by Mr Atherton and Folium were significant sums for the complainants.

85. The Tribunal considered that Mr Atherton's previous good character and lack of regulatory history were mitigating factors. The Tribunal noted that in regulatory proceedings, personal mitigation such as poor health has limited weight, as the Tribunal was concerned with protecting the public and maintaining the reputation of the profession. Accordingly, any health condition that now affects Mr Atherton would not mitigate any sanction.

86. The Tribunal noted that Mr Atherton had not demonstrated any remorse and there had not been a full apology issued to any of the complainants. No repayment had been made to any of the complainants.

87. The Tribunal considered that Mr Atherton had failed to demonstrate competence, to take due care and had provided an inadequate professional service and then breached the TDB's regulations by failing to promptly cooperate with the disciplinary investigation. The Tribunal considered that the charges that were proved demonstrated a serious failure in ethical conduct. Mr Atherton had failed to act with integrity towards vulnerable clients, taking money up front, failing to refund when work was not done and generally ignoring their complaints. Four similar complaints over the same period of time could not be regarded as coincidental. The four complaints demonstrated a pattern of conduct that demonstrated a cavalier attitude to clients. The Tribunal considered that membership of a professional organisation brought with it the responsibility to act with integrity towards clients. When a service could not be performed, it was Mr Atherton's duty to immediately inform the client and offer a refund. Where a mistake as to a recommendation of a product had been made by a colleague, it was Mr Atherton's duty to apologise to the client immediately and then offer a refund, before offering an alternative product. Mr Atherton's behaviour demonstrated to the Tribunal that he had put his own interests ahead of the four clients, by keeping their money and not providing any acceptable explanation to them for the lack of service provided.

88. The Tribunal considered, given the seriousness of the charges, that any sanction less than censure would not be appropriate. The Tribunal examined whether an order of censure was an appropriate sanction. The Tribunal noted that there were not particular circumstances of the case nor any mitigation advanced that meant that there was not a continuing risk to the public of such behaviour continuing. Indeed, the Tribunal considered that Mr Atherton had failed to demonstrate any appreciation of the harm that he had caused to the individual client or to the reputation of the profession. Accordingly, the Tribunal determined that an order of censure would be an inadequate sanction given the seriousness of the charges. For similar reasons, the Tribunal considered that imposing conditions on Mr Atherton, without any insight demonstrated as to the harm that he had caused, would not adequately reflect the seriousness of the charges and protect the public.

89. The Tribunal considered that Mr Atherton's conduct in relation to the four clients and thereafter in his response to the TDB's disciplinary investigation, demonstrated a persistent lack of understanding and appreciation of the seriousness of his actions and the consequences. His behaviour was a serious departure from the standards expected of a

member. It was only the day before the hearing that Mr Atherton wrote '*I apologise to clients who have been let down.*' The Tribunal considered that this comment was woefully inadequate. The Tribunal determined that this was a pattern of conduct where Mr Atherton had not demonstrated any appreciation for the harm he had caused and as a consequence the Tribunal was concerned that it would continue into the future. The conduct was fundamentally incompatible with remaining a member of the profession. As there remained a high risk of recurrence, the Tribunal considered that that suspension would not protect the public or maintain confidence in the profession. The Tribunal determined that the sanction was expulsion.

COSTS

90. Mr Smiley applied for costs to the sum of £14,894.58. The Tribunal had regard to the TDB's Guidance on Awarding Costs. The Tribunal noted that its power to award costs was set out in Regulation 27 and was discretionary. The Tribunal considered that it was right and proper in the light of its findings that Mr Atherton should pay the TDB's costs. The Tribunal examined the schedule of costs and considered that the amount applied for was reasonable given that there were four separate complaints. The Tribunal determined that it was fair and proportionate to award costs against Mr Atherton to the sum of £14,894.58. Accordingly, the Tribunal ordered that Mr Atherton pay costs to the sum of £14,894.58.

PUBLICITY

91. 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 Tribunal ordered that its findings be published.

EFFECTIVE DATE

92. 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)
30.09.2019