

IN THE DISCIPLINARY TRIBUNAL
OF THE TAXATION DISCIPLINARY BOARD

TDB/2019/20

B E T W E E N

THE TAXATION DISCIPLINARY BOARD (TDB)

– and –

Mr Cho Han Michael Feng
(ATT Member No. 114128)

DECISION AND REASONS

Introduction

1. The Disciplinary Tribunal sat on 27 July 2022 to hear charges brought by the Taxation Disciplinary Board (TDB) against Mr Michael Feng, following receipt of information from Mrs L (the Complainant).
2. The hearing was conducted remotely via a video conference platform. The Tribunal was chaired by Ms Gill Hawken, a solicitor, sitting with Ms Lorna Jacobs, a lay member and Mr Ian Luder, a member of the Chartered Institute of Taxation. The Presenter was Mr Alex Mills of Counsel. The Clerk to the TDB's Disciplinary Tribunal was Mr Nigel Bremner.

3. Mr Feng was present and represented himself at the hearing.
4. The Tribunal was provided with the following documents from the TDB:
 - A Summary and Charges bundle
 - A core bundle named DT Hearing Bundle A
 - A Supplementary bundle
 - A TDB Skeleton Argument/Case Summary from Mr Mills dated 20 July 2022
 - A bundle comprising the TDB Regulations and Guidance.
5. Mr Feng provided six bundles of documents to the Tribunal, labelled A-F.

Preliminary Matters

6. Mr Mills addressed to Panel in relation to a number of preliminary matters. The Tribunal heard submissions from both parties in relation to each matter and took into account the Skeleton Argument. It considered each matter separately and made the following determinations:

Email from Mr Feng to the TDB dated 10 July 2021

7. Mr Mills invited the Tribunal to admit into evidence an email dated 10 July 2021 from Mr Feng to the TDB. Mr Mills submitted that this was correspondence from Mr Feng to the TDB, was directly relevant to a matter at issue at this hearing, and that admitting the email into evidence would cause no injustice to Mr Feng.
8. Mr Feng opposed the application on the basis that he wrote it over two years after the events to which the email relates. He submitted that the email was not relevant as the charges that he faces relate to 2019 and he wrote the email in 2021.

9. The Tribunal noted that Mr Feng's objection to receiving this document in evidence was not about the content of his email, rather its date. The Tribunal decided that it would be fair to admit this email into evidence – which was clearly a relevant email to the matters that the Tribunal would need to decide in the course of the hearing – and that Mr Feng would be able to address it in due course in relation to any concerns that he might have about its accuracy, in light of it being written two years after the alleged events.
10. Further preliminary matters for the Tribunal's consideration were broadly set out in the Skeleton Argument/Case Summary and related to procedural matters that had arisen during the TDB's investigation and preparation of the case, and which Mr Feng considered to be unfair. The matters at issue can be summarised as follows:

Unfairness by the Investigating Committee

11. Mr Feng submitted that following the first Investigating Committee's (IC) involvement in 2020, he had a "*legal expectation*" that the matters had been closed. Instead, a second IC had then decided on 30 July 2021 that there was a case for him to answer and it was only at that stage that the allegation had been introduced around Mr Feng sending his witness statement to the Complainant's church (the Church). Mr Feng submitted that, until that point, there had been no mention of his witness statement in any correspondence from the TDB.
12. Mr Mills submitted that there was no unfairness to Mr Feng; that matters in this case had evolved, which meant that a number of allegations made by the Complainant were not being proceeded with; that two independent ICs had rightly been involved and that the second IC had decided that there was a prima facie case in relation to Mr Feng sending his witness statement to the Church.
13. The Tribunal considered that there was no inherent unfairness in the IC2 following the IC1. In fact, it was fairness that allowed all matters to be taken into account

after the County Court judgement and, in fact, some charges were now not being pursued by the TDB. It was clear to the Tribunal, on the documentation provided to it, that the second IC considered that there was a prima facie case in relation to Mr Feng sending the witness statement, and that appropriate charges should be drafted by the TDB. Further, the Tribunal noted that there has been no suggestion from Mr Feng that he has had insufficient time to prepare his case in relation to the allegation of sending his witness statement to the Church. In light of all the information available to it, the Tribunal concluded that there was no unfairness to Mr Feng on this point.

Delay

14. Mr Feng told the Tribunal that the delays in the TDB's investigation and preparation of the case had caused unfairness to him.
15. Mr Mills acknowledged that there had been delays between August 2021 and June 2022 in the TDB's preparation of this case. He submitted, however, that Mr Feng had been informed on 8 August 2021 that the second IC had referred an allegation an allegation to the Disciplinary Tribunal and, accordingly, Mr Feng knew that there would be a Disciplinary Tribunal. Mr Mills submitted that the delay in this matter was not an abuse of process, especially when Mr Feng knew that he would be facing a hearing.
16. The Tribunal considered the general principle set down in Attorney-General's Reference (No.1 of 1990) [1992] QB 630 that a stay of proceedings on the ground of unjustifiable delay will only be granted by the courts in exceptional circumstances and that to establish abuse of process based on delay, a defendant will need to prove that, because of the delay, he will suffer such serious prejudice that a fair *trial* cannot be held. Even where delay was unjustifiable, a permanent stay should be the exception rather than the rule. The Tribunal determined that the delays in this case, although regrettable, were not so unreasonable, and did not

mean that this Disciplinary Tribunal hearing could not be fair to Mr Feng. The Tribunal was mindful that the matters are to be decided, in due course, largely on documentary evidence in addition to Mr Feng's oral evidence.

Scope of Charges

17. In correspondence to the TDB prior to this hearing, Mr Feng considered that the scope of the charges had been widened to include "new" matters as follows and that this caused unfairness to him:

- His two emails of 18 May 2019 to the Church are now included in the charges as new charge 1.2.
- Mr Feng said that current charge 1.3, around his purposes and state of mind in sending the emails identified in charges 1.1/1.2, was new and had not been considered by the second IC.

18. Mr Mills submitted that the only matter which is "new", in the sense of not having been referred to in the note to the IC in these terms, is the materiality of the two emails of 18 May 2019, now included at charge 1.2. He submitted, however, that the two emails are clearly relevant, being connected in both subject matter and time to charge 1.1, and that the matter alleged at 1.2 in no way widens the scope of the alleged breaches of the PRPG. He reminded the Tribunal of the overriding consideration of fairness and submitted that these emails are based on material that Mr Feng has and that he can address in due course. Accordingly, he submitted that there is no unfairness in the inclusion of this charge 1.2.

19. In relation to charge 1.3, Mr Mills drew the Tribunal's attention to the IC's determination in which it made specific reference to "*the apparent purposes of the disclosures.*" Mr Mills argued that it is clear that the IC had included in its reasoning the question of Mr Feng's intention in sending the emails; also that the Regulations invite the TDB Presenter to frame the charges. If they did not, the process of settling

a charge (Regulation 8.2) would be without purpose. He also submitted that the only parts of the PRPG referred to in the charge are those referred by the IC, so there has been no widening of scope in that regard.

20. In relation to charge 1.2, the Tribunal looked carefully at the documents provided to it, including the decision of the second IC on 30 July 2021 and its consideration of a potential (second) breach of confidentiality. The IC was of the view that “*at the very least*” documents listed B51 - 65 (which included the two emails in issue of 18 May 2019) had been sent to the Church and had been disclosed to the IC. In this Tribunal’s view, those emails were not new. The second IC’s conclusion was that appropriate charges should be drafted.

21. In relation to charge 1.3 and Mr Feng’s objection to there being a charge alleging his intentions in sending the emails of 18 May 2019, the Tribunal noted paragraph 38 of the second IC’s decision which referenced, “*given the apparent purpose of the disclosures*”; also paragraph 39 in which the IC invited the TDB to “*draft appropriate charges ...*” In this Tribunal’s view, it was on that basis that a prima facie case (but not a proven cases) of a breach of client confidentiality/breach of Regulation 2.6.3 is made and, subsequently, a charge has been drafted. The Tribunal did not consider that there was unfairness to Mr Feng in this charge being included and Mr Feng will be able to address the charge in the hearing due course.

TDB Application to Admit Hearsay Evidence

22. Mr Mills referred the Tribunal to his Skeleton Argument in this regard. He reminded the Tribunal that the Complainant has declined to provide a witness statement to the TDB or to attend the hearing. He reiterated that the only aspect of the Complainant’s various emails or letters on which the TDB seeks to place any weight is the Complainant’s assertion that Mr Feng’s original email of 21 May 19 to her Church attached his witness statement (which Mr Feng denies). Mr Mills invited the Tribunal to consider whether there is any unfairness in the admission of the hearsay evidence of the Complainant on this topic.

23. Mr Mills referred the Tribunal to Regulation 30.4 which, in his submission, expressly contemplates the admission of hearsay evidence, and Regulation 30.1 which states that proceedings shall be conducted in a manner consistent with the principles of natural justice. He invited the Tribunal to have regard to the principles set down in El-Karout v NMC [2019] EWHC 28 (Admin) in its decision making, noting however that, unlike in El-Karout, this case does not centre around someone's recollection of events; rather, the Complainant's account is recorded clearly in correspondence and emails. Mr Mills submitted that the Complainant's evidence is very limited in scope, but is of critical importance. He submitted that the first reference made by the Complainant to the attaching of the witness statement was shortly after it was alleged to have been sent (June 2019) and well before the civil proceedings with Mr Feng went to a hearing. Her account was maintained in various pieces of correspondence between the TDB and the Complainant, and Mr Feng has had opportunities during the course of the case to challenge her account via correspondence. Mr Mills referred the Tribunal to the numerous attempts made by the TDB to engage with the Complainant and noted that she had engaged for an extended period and had given her reasons for disengaging at this point, following the County Court hearing. Finally, Mr Mills submitted that the Complainant's evidence is not "*sole and decisive*" and that there is other documentation within the bundles and a chronology of events which the Tribunal can use to assess the plausibility of the Complainant's account.
24. Mr Feng objected to the Tribunal admitting the Complainant's evidence, stating that he would vigorously challenge this to "*safeguard*" himself. The basis of Mr Feng's objection appeared to be his concern that, if the Tribunal were to admit it, it would find charge 1.1 proved.
25. The Tribunal bore in mind its wide discretion to admit evidence in these proceedings, noting that Regulation 30.4 is deliberately worded in a permissive way: "*...the Tribunal may admit any evidence, whether oral or written, whether direct or hearsay, and whether or not that evidence would be admissible in a court*

of law.” The Tribunal then considered relevant caselaw around the matters that a tribunal should take into account when considering the fairness of admitting hearsay into evidence, namely El-Karout and Thorneycroft v NMC [2014] EWHC 1565 (Admin). In coming to its decision, the Tribunal was aware that a decision on the admissibility of evidence is a judgment for it alone to make and is case specific. It bore in mind that the Complainant’s assertions that the original copy of Mr Feng’s email had his witness statement attached to it is materially in dispute and, by inference, the credibility of the Complainant is in issue.

26. The Tribunal noted that the Complainant has engaged with the TDB throughout a significant period of its investigation but had now decided to disengage and had given her reasons for doing so. The Tribunal was mindful of guidance from the courts that that the existence or otherwise of a good and cogent reason for the non-attendance of a witness is an important factor, but the absence of a good reason does not automatically result in the exclusion of the evidence. The Tribunal was of the view that the TDB has persistently tried to secure her engagement and that these efforts have continued until very recently. Key to the Tribunal’s consideration in this case is that the limited evidence from the Complainant is not “*sole and decisive*” evidence in relation to charge 1.1; rather it is ancillary to other evidence in the case, which the Tribunal will be able to use in due course to test the reliability of the Complainant’s evidence.

27. Having balanced the probative value and prejudicial effect of admitting the evidence, the Tribunal decided that it was fair to admit the Complainant’s emails into evidence. As with all evidence, however, the Tribunal will need to assess what weight should be given to this hearsay evidence in due course.

Close of Day 1 of the hearing

28. At 16.00, the Chair handed down the Tribunal’s decisions in relation to each preliminary matter and provided an oral summary of its reasoning. It was clear to

the Tribunal that the case would not conclude today. The Chair noted her concerns that the resuming hearing might require two days, noting that Mr Feng anticipated that his oral evidence might take half a day. She invited representations from both parties in this regard.

29. The parties were of the view that the case could be concluded in one day, both confirming that there were no further preliminary matters to raise.

Resuming hearing on 6 October 2022

30. The hearing resumed on 6 October 2022 via video conference, with the same members of the Tribunal and Mr Feng in attendance. On this occasion, Ms. Divya Puri of Counsel presented the case on behalf of the TDB.
31. Mr Feng provided a further bundle of documents to the Tribunal, labelled bundle G. Apart from that, no additional documents were provided to the Tribunal, other than those already listed at paragraphs 4 and 5 of this determination and the email of 10 July 2021 from Mr Feng (detailed at paragraphs 7-10) and the email dated 26 July 2022 from the Complainant to the TDB (detailed at paragraph 22) which were admitted into evidence by the Tribunal during the first day of the hearing .
32. In opening the resumed hearing, the Chair acknowledged receipt of the additional bundle of documents provided by Mr Feng. She outlined the procedure for this part of the hearing, and in particular the opportunities and time when Mr Feng would be able to make his own submissions and give evidence if he chose to do so. She further explained that the Tribunal was now concerned with a relatively narrow factual issue, and that it was for the TDB to prove its case on the balance of probabilities. The Tribunal was not going to re-hear arguments about the admissibility of hearsay evidence, which had already been considered in July. The Tribunal had concluded that it was fair to admit the hearsay evidence for the reasons enunciated in paragraphs 25 to 27 of this determination.

Charges

33. The charges set out below refer to the following rules of the Professional Rules and Practice Guidelines 2018 of the Chartered Institute of Taxation (the “CIOT”) and the Association of Taxation Technicians (the “ATT”) (the “PRPG 2018”), in force from 9 November 2018:

- (1) 2.5.1 and 2.5.2 (confidentiality); and
- (2) 2.6.3 (professional behaviour).

34. The charges brought against Mr Feng are as follows:

Charge 1

1.1 On 21 May 2019 Mr Feng sent an email containing a document referred to as a ‘witness statement’ to a church with which his client (Mrs L) had an association (“the church”), disclosing thereby to the recipients of the email information provided by Mrs L to Mr Feng as his client. Mr Feng’s actions were in breach of:

- (a) Rule 2.5.1, in that by sending the document Mr Feng breached the duty of confidentiality he owed to Mrs L in respect of the information he disclosed;
- (b) Rule 2.5.2, in that he divulged information acquired in the course of his work without the consent of Mrs L to do so or a legal or professional right or duty to disclose the information.

1.2 On 18 May 2019 Mr Feng emailed the church at 15:24 and 23.16. The emails contained reference to the fact that a complaint had been made to the TDB by Mrs L and to the fact that Mr Feng was taking advice as to an action of defamation.

1.3 One of Mr Feng's purposes in sending the emails identified in charges 1.1 and/or 1.2 was to seek to dissuade Mrs L from proceeding with her complaint to the TDB.

1.4 By reason of the matters identified at 1.1 to 1.3 above, Mr Feng breached Rule 2.6.3 in that he conducted himself in an unbecoming manner which tends to bring discredit upon a member and/or may harm the standing of the profession and/or the ATT.

Response to the Charges

35. In his Response Form dated 30 June 2022, and at the hearing, Mr Feng disputed Charges 1.1(a) and (b), 1.3 and 1.4. In relation to Charge 1.2, Mr Feng accepted that he sent the two emails on 18 May 2019 but did not agree that the content of those emails was as set out in the Charge.

The Hearing

36. Ms Puri drew the Tribunal's attention to relevant parts of the hearing bundles. The Skeleton Argument was helpful in that it detailed the correspondence between Mr Feng and his client, (the Complainant/Mrs L), in relation to these matters. Careful consideration of this correspondence was key to the Tribunal's considerations today.

37. Ms Puri detailed the TDB's case as follows:

- Mr Feng acted as a tax adviser to Mrs L.
- Mr Feng knew about Mrs L's connection with the church as a result of work undertaken as her tax adviser.
- On 1 May 2019, Mrs L sent a letter of complaint to the TDB about Mr Feng; this complaint comprised various concerns about his conduct in dealing with Mrs L's tax affairs. Those complaints have not led to allegations before this Tribunal and are unproven. The full complaint letter is relevant to the

TDB's case, however, as it was this letter which the TDB submits prompted Mr Feng to contact Mrs L's church.

- On 15 May 2019 the TDB posted a letter to Mr Feng, notifying him of Mrs L's complaint; Mr Feng received this letter on 16 May 2019.
- On 16 May 2019 Mr Feng reported Mrs L's husband to the police, although he had initially made a complaint in February 2019.
- On 18 May 2019, Mr Feng contacted Mrs L's church twice by email and also by telephone. The email sent at 15.24 referred to a telephone conversation that day with the church and set out Mr Feng's intention to email to the church the complaint made to the TDB by Mrs L. The email of 15.24 also forwarded another email sent by Mr Feng to Mrs L and her husband at 12.59 that day, informing them that he was taking advice on defamation proceedings, that he was going to contact Mrs L's church about her conduct and behaviour, and was going to complain to the police about her husband. Later that day, at 23.16, Mr Feng forwarded to the church an email sent to a solicitor, referring expressly to the fact of a complaint made to the TDB and asking whether he could take "*defamation action.*"
- There is no dispute that on 21 May 2019 Mr Feng lodged a "Defence and Counterclaim" document against Mrs L at Bristol County Court and attached his 55-paragraph witness statement to that counterclaim document.
- It is alleged that at 15.44 on 21 May 2019, Mr Feng sent to Mrs L's church the same "Defence and Counterclaim" document and 55-paragraph witness statement. Although Mr Feng admits that he emailed the church on 21 May 2019, he disputes having attached the witness statement. Also on 21 May 2019, Mr Feng sent his witness statement to the TDB by email. It is the TDB's submission that this email (i.e. the email to the church) made no sense without the attachment.
- On 23 May 2019 Mr Feng sent a response letter to the TDB. He enclosed his email of 21 May 2019 at 15.57 which referred to a witness statement, a copy of which was included with the letter. The witness statement sent to the TDB on 23 May 2019, and which Mr Feng said was contained in an

email at 15.57 on 21 May 2019, is identical to the witness statement which the TDB alleges was sent to Mrs L's church at 15.44 on 21 May 2019.

- On 1 July 2019 Mrs L reported to the TDB that Mr Feng had contacted her church. She referred to three emails that Mr Feng had sent and said that he had disclosed his "*Moneyclaim 55 points witness statements to the Bristol Chinese Church*", following which "*two pastors representing the church leadership came to speak to us on 11/6 to find out what has happened...*" The witness statement sent to the church was accompanied by the Defence and Counterclaim document of 21 May 2019 which stated, "*I enclose my witness statement.*"
- On 9 July 2019 Mrs L asked the church to delete the emails received from Mr Feng on the grounds that they breached her confidentiality.

38. Mr Feng gave evidence and made submissions to the Tribunal. He stated that he wanted "*to be heard*" and noted his concerns about what he considered to be the unfairness of the TDB proceedings that had led to this Tribunal hearing. He stated that he did not understand why Mr Mills was not here to present the TDB's case on this occasion and that he would have had "*lots of things to challenge him on*" because Mr Mills is telling the Tribunal "*lies.*" In Mr Feng's view, the TDB's bundle A offers a "*distorted truth of the admitted hearsay evidence*", whereas his own bundles of documentation, A-G, "*have everything.*" Mr Feng stated several times that he intended to appeal his case at the High Court.

39. In oral evidence, Mr Feng told the Tribunal that he had decided to contact Mrs L's church because of the assault that he had suffered by Mr L on 19 February 2019. He said that involving Mrs L's church was "*part and parcel*" of the matter with Mr L; that Mr and Mrs L are "*devout Christians*" and that their behaviour was "*not the behaviour of devout Christians.*" Mr Feng said that, even though Mrs L was his client, she had not come to rescue him from the alleged assault by Mr L on 19 February 2019.

40. Mr Feng said that he had intended to email Mrs L's complaint letter to the church on 20 May 2019 but that he did not do so, so he emailed the church on 21 May instead.
41. Mr Feng's evidence was that he completed his witness statement on 21 May 2019, a few minutes before he sent it to the TDB by email at 15.57. It is Mr Feng's case that, on that same day, he then wrote a letter to the Bristol County Court Business Centre, enclosing his witness statement, Defence and Counterclaim document and a cheque.
42. It is Mr Feng's case that, although he contacted Mrs L's church by telephone and email on 18 May 2019, and then by email again on 21 May 2019, he did not send his 55-paragraph witness statement to the church. He accepted that to have done so would have been a breach of Mrs L's confidentiality and would have been wrong. He stated several times that Mrs L was a "*master of redactions and alterations*" and it was Mr Feng's case that she had scanned the witness statement document via Avita MessageAngel and added it as an attachment to his email of 21 May 2019. Mr Feng described Mrs L as "*a troublemaker*", who was only interested in making money. He said that she was not interested in the TDB proceedings and that this is why she had not engaged with the proceedings. He said that had Mrs L attended this hearing, he would have challenged her to the effect that she had "*put the documents together to try to frame me.*"
43. Mr Feng told the Tribunal that, over a protracted period, the TDB had asked for his observations on a number of complaints made by Mrs L (most of which were now not being pursued by the TDB) but that, as far as he was concerned, he had not been asked about whether or not he had sent his witness statement to her church. Mr Feng said that as he had not been asked that question, he had not addressed the matter before this hearing and contended, "*I can only answer what I'm asked.*"

Decision on Facts

44. In reaching its decision on facts, the Tribunal was aware that the burden of proving the facts rests on the TDB and it is for the TDB to prove the charges. Mr Feng did not have to prove anything, and the Charges of the allegation could only be found proved if the Tribunal was satisfied, to the civil standard, on the balance of probabilities.
45. In reaching a determination of the facts, the Tribunal took into account the documentary evidence provided by both parties, Mr Feng's oral evidence, and the submissions of both parties. The Tribunal first considered the factual allegations set out in charges 1.1, 1.2 and 1.3. In light of its findings on those matters, it went on to consider whether Mr Feng's actions demonstrated that he conducted himself in an unbecoming manner.

Charge 1.1

46. It was not in dispute that on 21 May 2019, Mr Feng sent an email to a pastor at Mrs L's church at 15.44 and copied in Mrs L. Mrs L said that she did not receive the email. This charge required the TDB to prove, on the balance of probabilities, that Mr Feng's email of 21 May 2019 contained a document referred to as his witness statement.
47. The church has not been able to provide the original email sent by Mr Feng on 21 May 2019; the TDB states that, at Mrs L's request, the church deleted the emails sent to it by Mr Feng as Mrs L said that they breached her confidentiality.
48. It is not disputed, however, that the email from Mr Feng to Mrs L's church had as its subject matter, "*Final piece of information of my complaint about Mr and Mrs [L's] EVIL BEHAVIOUR.*" The body of the email read, "*For the attention of Pastor Wai. Please acknowledge receipt.*"

49. Mrs L states that Mr Feng attached his witness statement to that email to the church and she has provided to the TDB what she purports to be the document that he attached; Mr Feng disputes that he attached any document to his email of 21 May 2019 and argues that Mrs L was seeking to “*frame*” him.
50. Mr Feng told the Tribunal that it is his practice to use the subject line of an email as a shorthand way to communicate the content of his message. He accepted that this may not be normal practice but said that “*it’s how I do it.*” Mr Feng’s evidence was that his final complaint to the church via this email was to reference Mr and Mrs L’s “*EVIL BEHAVIOUR*” because they were both devout Christians and that he was simply asking the church to “*acknowledge receipt*” of his new information that their behaviour was evil. Mr Feng denied that he was contacting Mrs L’s church to provide his version of events. He said that his contacting the church was not motivated by Mrs L’s complaint to the TDB, rather Mr L’s assault on Mr Feng on 19 February 2019.
51. The Panel noted that in Mr Feng’s bundle were several emails which demonstrated that he did not invariably communicate the context of his message through the subject line of the email. Two such emails were of 10 August 2019 at 11.44 to the TDB; and 20 February 2020 at 17.52, also to the TDB. The former has a strapline which was blank, and a message, “*Because you have not responded to my emails I will send you by post by 31 August 2019*”, which clearly could have been contained in a strapline. The second email had a strapline which just showed it was a reply to one sent by the TDB, and a text, the key phrase of which was “*I am disappointed with your decision*” which, in the Tribunal’s view, clearly could have been communicated in the subject/strapline. Having read the voluminous correspondence between the TDB and Mr Feng in this matter over the last three years, the Tribunal considered Mr Feng’s argument, about his using the subject line of an email to communicate what he needs to say, to be a newly-raised argument and defence in relation to Charge 1.1, which the Tribunal did not find credible. The Tribunal noted that Mr Feng was made aware of Charge 1.1 in 2021 and that not only did his email

of 10 July 2021 mention the fact that his witness statement was in the public domain, but he did not dispute that he had sent it, nor that the subject line was the sole content of his email.

52. In light of all the information available to it, it appeared to the Tribunal that the evidence in support of this allegation was essentially two-fold. Firstly, were the assertions by Mrs L that Mr Feng had attached the witness statement and that, as a result, Mrs L and her husband had been visited at home by two pastors from the church. The Tribunal bore in mind that the evidence of the complainant, Mrs L, contained in various letters and emails in the hearing bundles, was hearsay as she had not given oral evidence at the hearing. Further, she had not provided a witness statement to the TDB. The Tribunal had, as part of its considerations on 27 July 2022, determined to admit into evidence her emails. The Tribunal had taken into account Mrs L's stated reason for declining to attend the hearing, noting her email of 19 March to the TDB which stated, "*I don't want to attend the court to meet the defendant again.*" It was very apparent to the Tribunal that there was a great deal of animosity between Mr Feng and Mrs L. It now considered what weight to give to the statements made by her in those documents. It was mindful that Mrs L's account is recorded clearly in correspondence and emails and, on balance, decided that it could place significant weight upon this documentary evidence.

53. Secondly, the Tribunal took into account Mr Feng's email of 10 July 2021 to the TDB which was provided in response to a document produced on behalf of the TDB. Paragraph 39 of that TDB document included information that "*Mr Feng emailed Mrs [L's] church in Bristol...One of Mr Feng's emails contained his reply to the defence and counterclaim at the Bristol County Court, and his witness statement...That witness statement contained details of his work on Mrs [L's] tax affairs and also her bank account details.*" In his email of 10 July 2021 to the TDB, Mr Feng responded, "*I have a further response to paragraph 39 about my witness statement. My witness statement was produced for a legal proceedings. My witness statement was put into evidence at the Bristol County Court held in public. Open*

court.” The Tribunal noted that Mr Feng had not, at that stage, in any way contested that he had sent his witness statement and it considered that it could properly infer from this response of 10 July 2021 that, in fact, Mr Feng had accepted that he had sent his witness statement to the church.

54. The Tribunal did not accept Mr Feng’s assertions that Mrs L had framed him, by scanning his witness statement to make an icon attachment. The Tribunal simply did not find any evidence that this was the case. Furthermore, taking into account Mr Feng’s reference in his email of 21 May 2019 to a “*Final piece of information*” and his request that the church acknowledge receipt of it, the Tribunal determined that it was more likely than not that there was an attachment to Mr Feng’s email and that the attachment was his witness statement.

55. Although Mr Feng now disputes that he had attached it, the Tribunal was satisfied on both Mr Feng’s own evidence in his email of 10 July 2021 and Mrs L’s evidence, that it was more likely than not that he had attached the document to his email sent to Mrs L’s church.

56. In light of all the evidence, the Tribunal was satisfied that the TDB had proved this charge to the required standard. The Tribunal therefore found this charge proved.

Charge 1.1(a)

57. Charge 1.1(a) alleges that Mr Feng’s actions were in breach of Rule 2.5.1, which provides that the duty of confidentiality to a client applies without time limit to all information with which the member is entrusted by his clients, or which is brought to his knowledge during or at any time after the carrying out of his assignment, or in the course of his professional practice in general.

58. The Tribunal noted that the witness statement detailed a volume of information about the Complainant’s tax affairs which was information provided by the Complainant to Mr Feng in his professional capacity. The Tribunal considered that

there was no basis for disclosing this information to Mrs L's church and it was in no doubt that, by disclosing such information, Mr Feng acted in breach of Rule 2.5.1 and his duty of confidentiality to his former client, Mrs L.

Charge 1.1(b)

59. Charge 1.1(b) alleges that Mr Feng acted in breach of Rules 2.5.2, which provides that information acquired in the course of a member's work must not be divulged in any way outside his organisation without the specific consent of the client, unless there is a legal or professional right or duty to disclose.
60. The clear evidence before the Tribunal is that Mrs L had not given her permission to Mr Feng to disclose any information to her church. For the same reasoning as set out in paragraph 56 above, the Tribunal was satisfied that Mr Feng acted in breach of Rule 2.5.2.

Charge 1.2

61. Mr Feng did not appear to contest this factual allegation in his Response Form, stating that he "*Will explain*" at the hearing. At the hearing, Mr Feng agreed that on 18 May 2019 he had sent the two emails timed at 15:24 and 23.16 to Mrs L's church. Although at the outset of the hearing, he had contested the content of the emails, in his evidence he appeared to accept that the content of the emails was "*in black and white.*"
62. The Tribunal noted that Mr Feng's email at 15.24 read as follows: "*Here is my email to [Mrs L] this afternoon. On Monday I will email you their complaint to my tax governing body.*" In light of this evidence, the Tribunal was satisfied that this email contained reference to the fact that a complaint had been made to the TDB by Mrs L.

63. In the same email of 15.24, Mr Feng forwarded an earlier email from that day, timed at 12.59 and sent to Mrs L which read, *“You are put on notice[d] that I am taking legal advice on defamation proceedings against you.”*
64. The Tribunal further noted that Mr Feng’s email at 23.16 read as follows: *“You will be hearing from my solicitor. Your husband will also be hearing from my solicitor about 14K Chinese Triad.”* That email forwarded an email of 18 May at 12.36 from Mr Feng to Kingsley Napley LLP in which Mr Feng was seeking legal advice and asked, *“A former client and her husband complained to my governing tax professional body, issued a claim through Moneyclaims online and reporting me to Information Rights Concerns. Can I take defamation action?”*
65. Accordingly, on the email evidence provided to it, the Tribunal found this factual charge proved.

Charge 1.3

66. In relation to this allegation, Mr Feng of course denied that he had sent the witness statement to Mrs L’s church. Mr Feng further said that calling Mrs L *“evil”* in his email of 21 May 2019 and sending his two emails of 18 May 2019 *“did not in any way, shape or form”* seek to dissuade Mrs L from proceeding with her complaint to the TDB. He said that he had contacted Mrs L’s church *“mainly because of the assault on my left eye [by Mr L]”* and that *“in terms of Mrs [L], it was inevitable that she had to be part of the information.”* In oral evidence to the Tribunal, Mr Feng described Mr and Mrs L on several occasions as *“devoted Christians”* and said that he had contacted the church because their behaviour had not been the behaviour of devoted Christians.
67. The Tribunal has now found that Mr Feng did send his witness statement to the church. It bore in mind the chronology of events in this matter - that the alleged assault by Mr L had been on 19 February 2019 (some three months before he contacted the church) and that Mr Feng had been notified of Mrs L’s complaint to

the TDB on 16 May 2019 (two days before he contacted the church). The Tribunal did not accept Mr Feng's evidence that his contacting the church was motivated by the alleged assault and was in no way to dissuade her from proceeding with her complaint to the TDB. It bore in mind the content of the emails from Mr Feng to the church – one of the emails of 18 May 2019 contained only scant information about the assault; the email of 21 May 2019 did not mention the assault at all; and only one paragraph of Mr Feng's 55-paragraph witness statement referenced the assault. The Tribunal was satisfied that it was more likely than not that Mr Feng contacted the church, two days after he became aware of the TDB complaint, in the hope that, once Mrs L became aware of his contact with her church, she would feel under pressure to withdraw her complaint.

68. The Tribunal was satisfied, on the balance of probabilities, that Mr Feng's purposes in sending the emails identified in charges 1.1 and/or 1.2 was indeed to seek to dissuade Mrs L from proceeding with her complaint to the TDB. Accordingly, the Tribunal found this charge proved.

Charge 1.4

69. It is alleged that, by reason of his actions in 1.1, 1.2 and 1.3, Mr Feng breached Rule 2.6.3 which provides that "*A member must be courteous and considerate towards all with whom he comes into contact in the course of his professional work.*"
70. Mr Feng disputed this Charge but focused his evidence and submissions on the purported events of 19 February 2019 at his office, which ended up with Mr Feng calling the police and asking Mrs L to rescue him from an alleged assault by Mr L.
71. The Tribunal was in no doubt that, by disclosing confidential information about a client, seeking to intimidate Mrs L and by seeking to dissuade her from pursuing her complaint through the TDB, Mr Feng breached Rule 2.6.3 in that he conducted himself in an unbecoming manner which tends to bring discredit upon him and/or may harm the standing of the profession and/or the ATT.

72. Accordingly, the Tribunal found this charge proved.

73. This constitutes the Tribunal's determination on the factual charges, but the matter has not yet concluded. The case will be adjourned until 25 January 2023, when the Tribunal will conclude the case after hearing submissions from both parties on sanction, costs and publicity.

Sanction Hearing 25 January 2023

74. The Tribunal reconvened on 25 January 2023 to consider what (if any) sanction to impose, in accordance with Regulation 20.6. Mr Feng was legally represented at this last stage of the proceedings by Mr Scott-Joynt of Counsel. The other participants in the hearing remained the same as on 6 October 2022.

75. Prior to the resumed hearing, the Tribunal received written submissions from both parties.

76. Ms Puri, on behalf of the TDB, submitted that the matters found proved in this case could not properly be described as minor, involving breaches of two of the five fundamental principles as set out in Section Two of the PRPG – namely, client confidentiality and professional behaviour. The TDB invited the Panel to consider Mr Feng's lack of understanding and appreciation of the seriousness of his actions and/or the consequences, together with his lack of insight, as aggravating features of the case. It was submitted that Mr Feng has continually and adamantly denied any impropriety or wrongdoing in contacting the Complaint's Church in May 2019 and has criticised and challenged the TDB's regulatory process at every stage, including by repeatedly reminding the Tribunal of his intention to appeal any adverse rulings. Ms Puri invited the Panel to reject the submissions on Mr Feng's behalf around his deep regret and his acknowledgement of his failings "*as wholly inconsistent with the evidence of Mr Feng's conduct and statements in these proceedings...*" In the TDB's submission, there was a real risk that a lesser sanction, such as a censure,

may not adequately protect the wider public interests in maintaining proper professional standards and the reputation of the tax profession.

77. Mr Scott-Joynt, on behalf of Mr Feng, submitted that Mr Feng accepted that his actions were wrong, were not inadvertent or accidental and that he regretted them. He submitted that Mr Feng acknowledged that realistically - particularly in the light of the reason for which the Tribunal found the information was shared with the Church - the Tribunal was likely to be choosing between censure on the one hand, and expulsion or suspension on the other. It was submitted that the unique circumstances which led to the conduct charged, the nature of the conduct in question (particularly when seen in the light of the broader statutory and legal context), and Mr Feng's own long and hitherto unblemished record of over 25 years should lead the Tribunal to determine that a censure, rather than expulsion, was the fitting and appropriate sanction. It was submitted that there is no realistic prospect of a continuing or repeated risk to the standing of the profession or the ATT from Mr Feng's conduct.

78. In supplementary oral submissions, Mr Scott-Joynt emphasised that the Tribunal should not take anything that he submits "*as trying to downplay the misconduct that has occurred*", and that Mr Feng knows that he let himself down, his profession down and his client down. He said that "*on very clear instruction*" from Mr Feng, he could say that Mr Feng understands that he has fallen short of the standards expected but that, until the hearing on 6 October 2022, Mr Feng had felt "*hard done by, by the circumstances that led to the situation*" with Mrs L and that this had "*coloured his approach up until the October hearing.*" Mr Scott-Joynt submitted that Mr Feng has now come to "*an entirely proper realisation and understanding*" and that Mr Feng presents no ongoing risk at all to the public or to the profession. He said that Mr Feng has drafted a letter of apology to Mrs L for his behaviour and will send this letter to her, irrespective of the outcome of this hearing. He also confirmed to the Tribunal that the named maker of the reference provided to the Tribunal about Mr Feng has taken into account each of the charges faced by Mr

Feng in agreeing to provide the reference. Finally, in relation to “loss”, Mr Scott-Joynt submitted that *“the overwhelming form of loss that we should look at is financial, and that there is there is no financial loss to Mrs L in this case.”*

79. In considering the appropriate and proportionate sanction in this case, the Tribunal had regard to the Indicative Sanctions Guidance (ISG), revised in January 2022. It also had regard to the principle of proportionality and the principle that any sanction imposed should be the least onerous measure that adequately meets the seriousness of the findings of fact.

80. It noted that the purpose of imposing a sanction upon a member was not simply to discipline the individual for any wrongdoing of which he may be culpable, but to protect the public, to uphold the proper standards of conduct in the profession, and maintain the reputation of the profession by sending a signal as to how serious the Tribunal judged the conduct to be. In carrying out these roles the Tribunal was maintaining the reputation of the profession. The Master of the Rolls stated in Bolton v The Law Society [1994] 2 ALL ER 486 that the reputation of a profession as a whole is more important than the fortunes of an individual member of that profession.

81. The Tribunal identified the following mitigating factors:

- a. Mr Feng has enjoyed a long career as a tax specialist, stretching back over 25 years, during which he has had a previously unblemished record.
- b. This was an isolated incident involving a single client.

82. The Tribunal considered aggravating factors to be that:

- Mr Feng deliberately provided the confidential information to Mrs L’s Church.
- Mr Feng specifically targeted Mrs L, with the aim of intimidating her.
- Mr Feng’s purpose was to seek to dissuade Mrs L from proceeding with her complaint to TDB.

83. The Tribunal considered the submissions from both parties in relation to the level of Mr Feng's insight and his remorse/regret for his actions towards Mrs L. Certainly, from Mr Scott-Joynt's representations to the Tribunal about his clear instructions from Mr Feng, there would appear to have been a stark change in Mr Feng's stance, compared with how Mr Feng presented himself on 27 July 2002 and 6 October 2022. Although it noted Mr Scott-Joynt's submissions, the Tribunal was disappointed that Mr Feng has not demonstrated a developed level of insight or any regret, either by way of a written statement or by directly addressing the Tribunal, despite being afforded the opportunity to do so by the Chair.
84. The Tribunal first considered whether it would be appropriate to conclude the case by taking no action. The Tribunal concluded that, in view of the nature and seriousness of Mr Feng's conduct and behaviour, and in the absence of exceptional circumstances, it would be inappropriate to take no action.
85. The Tribunal next considered whether it would be appropriate to order that this matter rests on file. The effect of such an order is that no action will be taken unless, during a specified period which could be up to three years, there is a further complaint which results in a disciplinary finding. The ISG suggests this will be an appropriate sanction where the misconduct is minor and is unlikely to be repeated. For the same reasons the Tribunal concluded that it would not be appropriate to make an order that the findings 'rest on the file.'
86. The Tribunal then considered a Warning. It noted that the ISG states:
'A warning may be appropriate where the conduct was minor, but the Tribunal nevertheless wishes to indicate that the behaviour was unacceptable.' The matters found proved were not minor; they were deliberate and targeted towards Mrs L, a client. There was no evidence before the Tribunal of Mr Feng's full understanding and appreciation of his failings, or any evidence of insight or genuine expression of regret. On that basis, the Tribunal concluded that a warning was not sufficient to reflect the seriousness with which it viewed Mr Feng's behaviour.

87. The Tribunal then considered a censure. The ISG indicates that *'a censure is appropriate where the misconduct is of a serious nature but there are particular circumstances of the case or mitigation advanced which satisfy the Tribunal that there is no risk to the public and similar relevant factors to those under 'Warning' are present'*; for example, there should be evidence of the member's understanding and appreciation of the failings found proved and genuine expression of regret. A censure will be appropriate where a Tribunal is satisfied that the misconduct is unlikely to be repeated in the future. As stated above, the matters leading to the charges found proved are serious, relating to a deliberate breach of confidentiality and poor professional behaviour towards a client. Mr Feng conducted himself in an unbecoming manner, seeking to both dissuade Mrs L from proceeding with her complaint to the TDB and to intimidate her. In the Tribunal's view, Mrs L was caused considerable stress and, in her words, emotional loss as a result of Mr Feng's conduct. Although the Tribunal felt it unlikely that Mr Feng would repeat this behaviour, it determined that this level of sanction was insufficient to maintain trust in the profession and the regulatory process, and to satisfy the public interest.

88. The Tribunal next considered a suspension of Mr Feng's membership. The Guidance states that suspension of membership is appropriate when the misconduct is sufficiently serious to warrant a temporary exclusion for membership but not so serious as to require permanent expulsion. For example, the Tribunal may consider that there is no risk of a recurrence of the misconduct; and the protection of the public can be assured by a temporary exclusion from the benefits of membership.

89. The Tribunal accepted Mr Scott-Joynt's submission that the experience of undergoing this regulatory process has come as a shock to Mr Feng and, in all likelihood, has served as a salutary lesson. The Tribunal considered that the risk of Mr Feng behaving in a similar way again was low. It was in no doubt, however, that Mr Feng's conduct towards Mrs L was sufficiently serious to warrant a temporary exclusion from membership. It was of the view that a period of suspension would be sufficient to mark the seriousness of the behaviour; it would afford Mr Feng the

opportunity to reflect fully on his misconduct; it would send a clear message to fellow professionals that such behaviour was wholly unacceptable; and a period of suspension would protect the public interest.

90. The Tribunal noted that for each category of complaint there is guidance on the sanction that would normally be imposed if the allegations are found proved. The ISG states, *'The guideline sanction is for guidance only and is not intended to be treated as a tariff. Each case will be judged on its own facts.'* In cases of Unethical Conduct (which specifically includes misuse of confidential information), the guidelines suggest that a censure or expulsion could be appropriate. This did not accord with the Tribunal's view of the appropriate sanction on the particular facts of this case, involving the deliberate targeting of a client by Mr Feng and his seeking to intimidate her and to dissuade her from complaining to his regulator. The Tribunal determined that a period of suspension was the appropriate and proportionate sanction in the particular circumstances.

91. The Tribunal did go on to consider whether expulsion was the appropriate sanction in this case, noting from the Guidance that such a sanction might be appropriate where there is a serious departure from relevant professional standards; or a persistent lack of understanding and appreciation of the seriousness of one's actions or their consequences. In a finely balanced decision, the Tribunal determined that, in light of Mr Feng's long and hitherto unblemished professional career, expulsion from membership would be disproportionate and unduly punitive.

92. The Tribunal thus determined that a Suspension for a period of 12 months would be sufficient to maintain public trust in the profession and the regulatory process and would have a deterrent effect on other members.

Costs

93. The TDB applied for costs in the sum of £18,246.50. The TDB submitted that the costs set out are appropriate and have been reasonably incurred. The TDB noted that

Mr Feng has denied the allegations at every stage of these proceedings and advanced preliminary legal arguments as part of his defence to the charges. In summary, the TDB submitted that, *“The costs arising directly from Mr Feng advancing those arguments, all of which were refused, are three-fold. Firstly, it necessitated that the TDB retain instructed Counsel Mr Mills to present its case on the final, reduced charges, at the hearing on 27th July given the legal complexities. Secondly, the arguments consumed the entirety of the original one-day time estimate for this hearing, thereby necessitating further Tribunal and preparation costs for a second listing. Thirdly, it was necessary for the TDB to instruct alternative Counsel out of fairness to Mr Feng, to enable the earliest possible date for his resumed hearing to be taken and avoid further delay. Some overlap in ‘reading in’ is expected as an ordinary consequence of any part-heard matter. The charges having now been found proven, it is appropriate that these costs are ordered to be paid in full.”*

94. Mr Feng had been sent a copy of the costs schedule prior to the hearing and given the opportunity to make representations. He had supplied information about his salary for the Tribunal’s consideration in accordance with paragraph 5.6 of the TDB’s Guidance on Awarding Costs and provided written submissions. Mr Feng’s legal counsel asked the Tribunal to take into account Mr Feng’s reasonable ability to pay costs of this magnitude and to permit payment of costs by instalments. It was submitted that some reduction ought to be made in recognition of several of the charges not being proceeded with following the second Investigating Committee stage.

95. The Tribunal had regard to Annex C of the Guidance on Awarding Costs. It noted that its power to award costs was set out in Regulation 20.6 (f) in dealing with a respondent against whom a charge has been proved. The presumption that an unsuccessful respondent should pay costs was based on the principle that the majority of professional members should not subsidise the minority who, through their own failing, have brought upon themselves disciplinary proceedings. The

power to award costs was discretionary. The general principle required exceptional circumstances for a Tribunal not to award costs against an unsuccessful respondent.

96. The Tribunal did not find any exceptional circumstances as to why Mr Feng should not be ordered to pay costs. All of the charges have been found proved in this case.

97. The Tribunal was mindful of the Guidance that it may decide to vary the level of costs after considering the member's financial situation. Mr Feng has provided documentary evidence to indicate his salary taken from his business in his role as director. He has not provided wider evidence such as the accounts of the business or a personal balance sheet. In light of the information provided to the Tribunal, it did not vary the level of costs on the basis of Mr Feng's financial situation.

98. The Tribunal considered the breakdown of the costs claimed in the schedule and determined that the costs outlined were, in general, proportionately and reasonably incurred. In light of the fact that a number of the charges considered at the Investigating Committee stage were not pursued further by the TDB, however, the Tribunal decided to reduce the costs incurred at the Investigation Committee stage (being £1962.50) by 40 per cent, amounting to a reduction of £785.00. Accordingly, the Tribunal ordered Mr Feng to pay costs in the sum of £17,461.50.

99. It was agreed that Mr Feng be permitted to pay those costs in equal (or thereabouts) instalments over a twelve-month period, the first to be paid on 25 February 2023 and monthly thereafter.

Publication

100. The Tribunal considered Regulation 28 and Annex B of the Guidance on the publication of disciplinary and appeal findings. It noted the general principle that any disciplinary findings made against a member would be published and the member named in the publication. The purpose of publishing such a decision was not to add further punishment for the member. Rather, it was to provide reassurance

that the public interest was being protected and that, where a complaint was made against a member of one of the professional bodies covered by the Taxation Disciplinary Scheme, there were defined, transparent procedures for examining the complaint in a professional manner and for imposing a sanction upon a member against whom a disciplinary charge had been proved.

101. In the particular circumstances of this case, the Tribunal was unable to identify any reason for departing from the presumption in favour of publication. As noted above, part of the role of the Tribunal is to uphold the reputation of the profession, and publication of its decisions is an essential part of that duty.

102. The Tribunal ordered that, in accordance with Regulation 28.1, this order and these findings should be published, referring to Mr Feng by name, in the Tax Adviser Journal and on the TDB website for a period of 3 years.

103. Pursuant to Regulation 28.4, publication will be made after the expiry of the appeal period, namely within 21 days of the effective date of this order, provided that no valid notice of appeal is served within that period.

Effective Date

104. Pursuant to Regulation 20.9, this decision will be treated as effective from the date on which it is deemed served on Mr Feng.



Gill Hawken
Chair, Disciplinary Tribunal
Taxation Disciplinary Board

26 January 2023