THE INSOLVENCY PRACTITIONERS ASSOCIATION DISCIPLINARY COMMITTEE

Between:

Insolvency Practitioners Association

AGAINST

Graham Lindsay Down

A Member of the Insolvency Practitioners Association

(The Respondent)

The Disciplinary Tribunal considered two separate cases concerning the Respondent.

The First Formal Complaint states:

That according to Article 66 of the Articles of Association the Member is liable to disciplinary action in that he has breached the Fundamental Principle of Professional Behaviour as set out in the Ethics Code for Members by failing to respond to communications dated 15 September 2017, 26 October 2017 and 9 November 2017 which requested self-certification reviews to be completed in a timely manner.

The Second Formal Complaint states:

That according to Article 66 of the Articles of Association the Member is liable to disciplinary action in that he has breached the Fundamental Principle of competence and due care as set out in the Ethics Code for Members in that he failed

1 to notify his appointment as Liquidator of a company on 2 July 2015 to the Registrar of Companies as required under Rule 4.106A (4) of the Insolvency Rules 1986 as soon as reasonably practicable notification being made on 30 October 2017;

2

a) to issue an annual report for the year to 1 July 2016 by 1 September 2016, and
b) to lodge a copy of a report with the Registrar of Companies as required under Rule 4.49B of the Insolvency Rules 1986;

3

a) to issue an annual report for the year to 1 July 2017 by 1 September 2017, and

b) to lodge a copy of the report with the Registrar of Companies as required under Rule 18.8 of the Insolvency Rules 2016 the report being issued and lodged 20 November 2017, 11 weeks late;

4 to respond to communications from a creditor requesting reports and information dated 9 May 2016, 8 December 2016, 9 February 2017, 2 March 2017, 22 June 2017, 20 July 2017 and 26 September 2017;

5 to provide information to a creditor promised in a telephone conversation with a representative of that creditor on 20 April 2017.

At the outset of the hearing the Respondent admitted the facts as set out in both complaints.

In coming to its decision on the facts the Tribunal bore in mind that the burden is on the Insolvency Practitioners Association (IPA) to prove the facts to the civil standard of proof namely, on the balance of probabilities.

Ms Owen on behalf of the IPA outlined the circumstances of the cases.

Background

The Respondent is sole director and shareholder in his practice Tri Group. The events in relation to Formal Complaint 1 occurred when the practice was still known as Burton Sweet Corporate Recovery.

This Complaint was referred to the Investigation Committee ('IC') by the Membership and Authorisation Committee ('M&AC') in accordance with M&AC Rule 5.2 on 13 December 2017. The reason for the referral was late submission of self-certification reviews by the Respondent. The self-certification was introduced in 2005 to provide a framework for IPA licensed Insolvency Practitioners to demonstrate effective self-reviews of their cases as a significant part of the regulators implementation of a risk-based approach to regulation.

Self-review requests are issued to licensed members in the year prior to their full inspection visit which usually occurs every three years. A template is provided for self-certification declarations and in most cases supporting documentation should be provided.

The first request for completion of self-certification reviews by the Respondent was issued on 15 September 2017. The date by which the reviews had to returned was 16 October 2017. There was no response.

A further email was sent on 26 October 2017 pointing out that the self-certification was overdue and asking that they be returned as a matter of urgency. A letter was sent on 9 November 2017 pointing out the self-certifications were long overdue and giving seven days from 9 November to provide them, failing which the matter would be reported to M&AC.

A letter dated 29 November from Head of Regulatory Operations was sent on 29 November informing the Respondent the outstanding self-certifications would be reported to M&AC on 13 December. On 12 December 2017 the Respondent delivered to the IPA offices the self-certifications.

M&AC decided, notwithstanding delivery of the outstanding self-certifications the day before, the Respondent's conduct should be referred to IC for disciplinary consideration.

On 22 February 2018 the Respondent was invited to make representations on the allegation which is the subject of the Formal Complaint. There was no response.

In respect of the second Formal Complaint, the underlying complaint was made by Martin Brodie of Lloyds Banking Group. The bank was an unsecured creditor in a compulsory liquidation estate in which the Respondent was Liquidator. The focus of that complaint was the lack of response by the Respondent to numerous requests for information. During the IPA's investigation of that complaint additional failings were identified.

Rule 4.106A (4) of the Insolvency Rules 1986 – as amended by the Insolvency Amendment Rules 2010- requires that 'as *soon as reasonably practicable a liquidator appointed in a winding up by the court must notify the appointment to the registrar of companies.'*

Notification to the Registrar of Companies was signed by the Respondent on 30 October 2017, 28 months after his appointment and the IC say not 'as soon as reasonably practicable'.

Rule 4.49 of the Insolvency Rules 1986 as amended by the 2010 Amendment Rules, covers information a liquidator must provide to creditors and contributories. Rule 4.49B covers reports to creditors and members in compulsory liquidations. Paragraph 4 provides '*The progress report must, except where paragraph (5) or (6) applies, cover the period of 1 year commencing on the date on which the liquidator is appointed and every subsequent period of 1 year'.*

The report for the first year should therefore have been issued by 1 September 2016. It was not issued.

Paragraph 7 of the same Rule provides '*The liquidator must send a copy of the progress report within 2 months of the end of the period covered by the report, to the registrar of companies, to the members of the company and to the creditors'.*

For this estate the report would run for the period 2 July to 1 July and needed to be sent by 1 September 2016. No copy of the first annual report was lodged at Companies House.

The Respondent did not provide a copy of the first annual report notwithstanding a request that he do so.

Allegation 3, is very similar to the allegation above save that the requirements arise under the Insolvency (England and Wales) Rules 2016 and the report was issued and lodged but 11 weeks late and as such in breach of Rule 18.8. Annual reports still need to cover a period of 12 months from appointment and each subsequent 12-month period. Paragraph 5 of Rule 18.8 restates that reports must be lodged with the Registrar of Companies within 2 months of the end of the period covered in the report so by 1 September 2017.

A request was made to the Respondent for a copy of the report 11 December 2017 but in the absence of a response a copy was obtained from the Companies House website and printed. The date of sign off and lodgement is 20 November 2017. As late as 8 June 2018 the Complainant Mr Brodie had not seen the report.

Mr Brodie's communications were never responded to on 7 occasions when requests were made.

Further, there was a telephone conversation between the Respondent and Mr Brodie on 20 April 2017 in which an assurance was given that the full annual report would be sent. In the 20 June 2017 email Mr Brodie asks for the report 'by return'. By 20 July 2017 Mr Brodie was still awaiting a response.

Decision on Facts and Sanction

The Tribunal took into account all the evidence before it including the submissions by Ms Owen on behalf of the IPA and the submissions of the Respondent. It retired briefly to consider the matter and it concluded that the facts as admitted were found proved.

The Tribunal next went on to consider what if any sanction would be appropriate. The Tribunal was informed that there is one previous adverse finding against the Respondent where he received a Warning. Further the Tribunal was made aware that the Regulatory Committee has recently written to the Respondent on 28 October 2019 following consideration of withdrawing his licence, that it would not do so on the basis that the Respondent would comply with a number of Conditions.

The Respondent informed the Tribunal that he considered that no great harm was caused to the IPA or the public interest by his failure to reply promptly. He gave a number of examples when he stated that the IPA were late in responding to his correspondence on different matters.

In respect of the second Complaint he was apologetic for the inconvenience caused to Mr Brodie. He referred to system failures within the office which have been rectified. He submitted that his ill health may have played a part in his conduct.

In respect of the previous adverse finding, the Warning, he said that he did not accept the finding. He said that he did not bother to appeal it as there were no financial implications for him.

The Tribunal in coming to its decision on sanction took into account the Public Interest in terms of protecting the public, maintaining public confidence in the profession and upholding proper standards of conduct and behaviour. It is aware that any decision it makes must be proportionate balancing the need to protect the public with the Respondent's own interests.

The Tribunal accepts that the Respondent admitted the facts however, failure to respond to communications from the regulator are a matter of serious concern. In this particular case the failure was repeated. Further the failure to respond occurred in connection with carrying out the statutory duty to regulate by the IPA. The Tribunal considered that the failure was serious and undermined the role of the regulator.

Further the Tribunal considered that it was a serious failing by the Respondent not to notify the Registrar of Companies of an appointment, prepare, issue and lodge reports. These are all obligations arising under statute on all appointees in a compulsory liquidation.

Viewed individually each failure may not attract censure but when viewed collectively together with the lack of care and competence shown in relation to communication with a creditor, the Tribunal considers that the behaviour is serious and amounts to misconduct.

The Tribunal was concerned with the Respondent's degree of insight into his wrongdoing and the role of his regulator.

The Tribunal considered the various sanction options open to it and it considered that it would not be appropriate to impose no sanction in respect of either complaint.

The Tribunal took into account the information before it that the Respondent is subject to the Regulatory Committee process where he has been asked to comply with conditions on his licence. He has told this Tribunal that he will comply with those conditions.

In respect of the first Formal Complaint the Tribunal determined to impose a sanction of Reprimand and a fine of £1000. In respect of the second Formal Complaint it determined to impose a sanction of Severe Reprimand and a fine of £1000. The Tribunal considered that these were the appropriate sanctions taking into account the difficult personal and financial circumstances of the Respondent and the Respondent's agreement to comply with the proposed conditions on his licence.

The Tribunal considered that a Costs Order in the sum of £7150 was also appropriate. The Tribunal decided to exercise its discretion to allow the Respondent time to pay the Fines and Costs given his difficult personal and financial circumstances. It considered that the Respondent should be given 12 months to pay the Fines and Costs.