**INSOLVENCY PRACTITIONERS ASSOCIATION**
**In the matter of**

**Mr Mark Tailby**
**(a Member of the Insolvency Practitioners Association)**

**(Respondent)**

## Introduction

1. Pursuant to the Disciplinary Rules (the Rules) of the Insolvency Practitioners Association (the Association), a Tribunal of the Disciplinary and Appeals Committee convened following the referral of a Formal Complaint against the Respondent by the Regulation & Conduct Committee. The hearing took place on 22 and 30 September 2020 by remote video link using Zoom.

2. The Association was represented by Mr. Wells of Counsel and the Respondent was represented by Ms. Hewitt of Counsel. The Tribunal has been provided with a Consolidated Bundle of documents upon which both parties relied. The Tribunal noted that the Respondent was a little unwell during the hearing. It confirmed that he was sufficiently well enough to continue with the hearing and ensured that he was given regular breaks during it.

3. There was some discussion in relation to the procedure to be adopted at the hearing. The Legal Assessor advised and the parties agreed that the hearing ought to be in two stages. Firstly, after hearing the evidence and submissions, the Tribunal should consider and make findings in respect of the Formal Complaint and give reasons for its findings. If it found the whole or part of the Formal Complaint proved, it should then hear submissions before considering what Order, if any, was to be made.

## Application to Amend the Formal Complaint

4. At the outset of the hearing Mr. Wells, on behalf of the Association, made an application to amend the Formal Complaint. In respect of Complaint 2, he invited the Tribunal to amend it by the insertion of the words *'Level Line Scaffolding Ltd and between 02/10/14 and 19/11/15 in his capacity as liquidator of'* after the words *'liquidator of'* in substitution of the words *'both Level Line Scaffolding Ltd and'* in the first line of the Complaint. He submitted that this made the Complaint clearer in what it alleged; it did not change the substance of the allegation nor did it impinge on the Respondent's ability to respond to the Complaint. He argued that there would be no prejudice or unfairness to the Respondent. He reminded the Tribunal of its powers under Rules 27, 31 and 32 of the Rules, respectively.

5. On behalf of the Respondent, Ms. Hewitt asked for an opportunity to take further instructions. The Tribunal readily agreed to her request and having taken instructions, she did not object to the application to amend Complaint 2.

6. The Tribunal accepted the advice of the Legal Assessor and then considered the application. It concluded that the amendment would be in accordance with the rules of natural justice and that there would be no unfairness to the Respondent in permitting Complaint 2 to be amended.

**The Hearing**

7. In accordance with Rule 28 of the Rules, the Legal Assessor read out the Formal Complaint as follows:

*In accordance with Conduct Rule 4.5.1, on 21 January 2020, the Regulation and Conduct Committee (R&CC) referred the following Complaints to the Disciplinary Committee as a Formal Complaint and, in accordance with Conduct Rule 6.3, on 6 August 2020 approved the Formal Complaint and the Summary of the complaints:*

*That according to Article 66 of the Articles of Association the Member is liable to disciplinary action in relation to a breach of the Fundamental Principles as set out in the Ethics Code for Members, in that;*

**Complaint 1**

***Between 1 October 2014 and 19 November 2015 Mr Tailby, in his capacity as liquidator of Consult Zee Limited, breached the Fundamental Principle of Professional Competence and Due Care set out at paragraph 4 of the Insolvency Code of Ethics by failing to submit a D1 report on the conduct of the directors of Consult Zee Limited as required by Statement of Insolvency Practice 4 in respect of a failure to produce Company books and records and a preference payment made by Consult Zee Limited for £30,000 and/or failed to document the reasons why a D1 report was not deemed appropriate.***

**Complaint 2 (as amended)**

***Between 1 October 2013 and 13 May 2014 Mr Tailby In his capacity as liquidator of Level Line Scaffolding Ltd and between 2 October 2014 and 19 November 2015 in his capacity as liquidator of Consult Zee Ltd ('the Companies'), breached the Fundamental Principle of Professional competence and due care set out at paragraph 4 of the Insolvency Code of Ethics by approving claims submitted to the Redundancy Payments Service ('RPS') by UKELC (NM&E) Ltd on behalf of the former directors of the Companies , without adequately verifying the claims.***

**Complaint 3**

***Between 1 June 2013 and 31 March 2016 Mr Tailby in his capacity as liquidator of various companies breached the Fundamental Principles of Objectivity and/or Professional Competence and Due Care and/or Professional Behaviour set out at paragraph 4 of the Insolvency Code of Ethics by:***

***(a) failing to identify a self- interest threat as set out in paragraph 10(a) of the Insolvency Code of Ethics arising from his shareholding in Bridgewater Financial (Leicester) Ltd, and/or***

*(b) failing to introduce sufficient safeguards to reduce that threat to an acceptable level as required by paragraph 19 of the Insolvency Code of Ethics, and/or*

*(c) between 1 June 2013 and 31 March 2016 breached paragraphs 55-56 & 60-62 of the Insolvency Code of Ethics and Statement of Insolvency Practice 9, by*

*a. directly, or indirectly, allowing payments totalling £24,366 (the Payments) from UKELC (NE&M) Ltd to be received by Bridgewater Financial (Leicester) Ltd, a company of which the Respondent was a 50% shareholder.* **These payments were referral fees paid to Mr Tailby for his referral of the directors or employees of Companies being liquidated by Mr Tailby (or by another office holder at his firm, CBA Insolvency Practitioners) to UKELC (NE&M) Ltd. UKELC (NE&M) Limited submitted claims to the RPS on behalf of the referred directors and employees and received commission from the sums received by those directors and employees from RPS, and,**

*b. Failing to disclose his interest in Bridgewater to the directors and creditors of the relevant Liquidating companies.*

8. On behalf of the Respondent, Ms Hewitt confirmed that the Complaints were not admitted.

9. Mr Wells then made a brief, unopposed application for the admission of further documents under Rule 13 of the Rules which consisted of the Code of Ethics, Statements of Insolvency Practice (SIPs) and blank RP14 form. The Tribunal accepted the additional documents into evidence.

10. Mr Wells opened the case and made submissions. He set out the background of the case and took the Tribunal through the documentary evidence supporting the individual complaints as well as through relevant parts of the Code of Ethics and SIPS.

11. In brief, in respect of Complaint 1, he submitted that the submission of a D1 form was clearly required because the payments to the Director of the company was a classic preference payment. There were other factors involved but this on its own was sufficient to require a D1 form to be submitted and one had not. Further and in any event, there were no records whatsoever to show that the Respondent had recorded his reasons for deciding why the submission of a D1 form was not merited in the circumstances.

12. In respect of Complaint 2, he referred the Tribunal to the RP14 forms which were submitted by the Respondent at a time that he did not have the relevant records for the companies involved. The effect of the Respondent submitting the RP14 forms was to approve the claims submitted to the Redundancy Payments Service (RPS) because it would not otherwise have made such payments. Mr. Wells made it clear that there was no suggestion that the claims made to the RPS were incorrect or fraudulent but the position remained that the Respondent could not have known that the information he was submitting to the RPS was correct. The liquidator's role was more than that of

acting as a mere post-box; the role added a degree of confirmation that the amounts claimed were correct.

13. In respect of Complaint 3, he submitted that the Respondent was party to an agreement with UKELC to whom he referred directors and employees of companies he was liquidating. UKELC received commission for the work they did on behalf of such directors and employees. As a result of the referrals it received from the Respondent, UKELC paid referral fees to a company (Bridgewater) in which the Respondent was a fifty percent shareholder. The remaining fifty percent of shares was owned by the Respondent's father. Mr Wells submitted that the agreement between the Respondent and UKELC for the latter to pay referral fees to Bridgewater created a threat to the Respondent's objectivity and that he failed to identify the threat or take sufficient safeguards against it. The Respondent's interest in Bridgewater was never disclosed to the directors and creditors of liquidating companies.

14. He reserved his final submissions until after the Respondent had given evidence.

15. The Respondent gave oral evidence. He adopted his witness statement dated 4 September 2020. He was then asked a number of additional questions by Ms Hewitt following which he was cross examined by Mr Wells. He also answered questions from the Tribunal.

16. In brief, the Respondent's evidence was that whilst he contested the allegations, he would accept the findings of the Tribunal and apologised for his conduct. He did not believe that his conduct had fallen short of the fundamental principles. He set out his background and professional career history. [redacted] He described the period as a 'very difficult and stressful time'.

17. In respect of Complaint 1, he stated that whilst he had acted on the information provided by another colleague who reviewed the case, the decision not to submit a D1 report was his and that he stood by his reasons for not submitting one. Amongst other factors, the lack of compliance regarding provision of records by the Director of the company was minor. It was the correct decision based upon the information available to him at the time. The issue of preference payments was not clearly reasoned or fully documented.

18. In respect of Complaint 2, he stated that he did not approve or verify claims to the RPS. The RP14 was submitted on the basis of the information he had; it was difficult to obtain all information from SMEs and ultimately, he relied on a 'sense check'.

19. In respect of Complaint 3, he stated that he identified the self-interest threat and introduced sufficient safeguards against it by telephoning the ACCA Ethics helpline to seek advice. The advice he received was that there was no conflict of interest. He accepted that the call to the Ethics Helpline was made in 2011 but that Bridgewater was not formed until 2013. He stated that this did not make any difference to his

identification of the self-interest threat because the principle of the advice was the same because he had explained the mechanism for the referral payments.

20. In closing, Mr Wells did not make any further submissions.

21. Ms Hewitt submitted that the Respondent had fully engaged with the Insolvency Service. He has provided a full and cogent explanation and had tried his best to assist. If the Tribunal did make any adverse findings into the conduct of the Respondent, these should be made on the basis that such conduct was inadvertent.

22. After receiving advice from the Legal Assessor, the Tribunal retired to consider its findings. It was not possible to conclude the hearing in the time available and it briefly reconvened to adjourn the hearing to a future date to be agreed. In the event, the hearing reconvened on 30 September 2020.

**Findings and Reasons**

23. In considering the Complaints individually, the Tribunal has carefully considered all of the evidence before it, both oral and documentary. It has taken account of the submissions of the parties.

24. Throughout its deliberations, it has borne in mind that the burden of proof is on the Association to prove each of the Complaints and remains with it throughout. The Respondent is not required to prove anything. The standard of proof applied by the Tribunal is the civil standard, known as the balance of probabilities. It notes that this is a single unvarying standard.

25. The Tribunal notes that Rule 44 of the Rules requires it to give 'brief' reasons for its findings.

26. **The Tribunal finds Complaint 1 PROVED in its entirety**. In the Tribunal's judgement, it was clear that the preference payments should have been reported in view of the way in which the funds were used by the director of the company. In coming to that conclusion, the Tribunal had regard to SIP 4, in particular paragraphs 4 to 8 and 10. The Tribunal noted that the Respondent was not able to explain why he decided that it was unnecessary to submit a D1 report when the director had clearly expressed what the payments were being used for.

27. Paragraph 12 of SIP 4 expressly states that particular weight is attached to preference payments and personal benefits obtained by directors. The Tribunal noted the Respondent's view that it was a minor compliance failure on the part of the director but was unpersuaded by this. In the Tribunal's view, it was plain, on the information available to the Respondent at the relevant time that it was necessary to submit a D1 report.

28. The Tribunal also found the alternative limb of Complaint 1 proved. The Respondent accepted in evidence that he had not fully documented the reasons for not submitting the D1 report. The Tribunal is satisfied that the Respondent had a duty to make an appropriate record of reasons for deciding not to submit a D1 report in

any matter he was dealing with. It finds that there is no evidence before it that the Respondent documented the reasons for his decision not to submit the D1 report.

29. The Tribunal finds that the Respondent consequently breached the Fundamental Principle of Professional Competence and Due Care set out in Paragraph 4 of the Insolvency Code of Ethics.

30. **The Tribunal finds Complaint 2 NOT PROVED**. In the Tribunal's view, the Association has failed to discharge the burden of proof which it bears. The Tribunal was concerned with the haste with which the Respondent submitted the RP14 forms in relation to the respective companies particularly given the absence of supporting records at the time of submission. However, it was satisfied that the Respondent did not 'approve' the claims submitted to the RPS and notes that it is the role of the RPS itself to adjudicate upon claims submitted to it by claimants, not the Office-holder who has an important supporting role in providing information which is correct to the best of his/her knowledge but the role of the Office-holder is not determinative. The word 'approve' in the wording of Complaint 2 suggests that the person giving approval has tested the thing being approved and found it to be legitimate – it has the flavour of something being adjudicated upon. In the Tribunal's view, the Respondent did not 'approve' the claims. Clearly, the Respondent could not have properly checked the information in the RP14 form because he did not have the respective companies records and books at the time he submitted the RP14 forms, however, that is not the allegation in the Complaint.

31. **The Tribunal finds Complaint 3 PROVED in its entirety**. In relation to Complaint 3a, the Tribunal notes that the Respondent accepted in evidence that the agreement for referral fees to be paid created a self-interest threat. Having identified a self-interest threat in 2011, he asserts that he telephoned the ACCA Ethics helpline for advice. The Respondent states that he was advised that a conflict of interest did not arise.

32. The Tribunal is satisfied that the Respondent could not have identified the self-interest threat in respect of Bridgewater at a time the company was not in existence, nor could he have explained to the Ethics helpline advisor that his father would be a fifty percent shareholder in Bridgewater. The Tribunal rejects the Respondent's evidence that the principle of the advice was the same because he had explained the mechanism of the referral payments to the advisor. The Tribunal cannot see how the Respondent could have reasonably placed reliance on advice that was given in 2011 in relation to circumstances which arose two years later. It therefore concludes that the Respondent failed to identify a self-interest threat as alleged contrary to Paragraph 10(a) of the Insolvency Code of Ethics. In making that finding, the Tribunal is satisfied that the Respondent had a duty to identify self-interest threats which arose in the course of his professional duties. The Tribunal is satisfied that Bridgewater was an associate of the Respondent in accordance with the provisions of Section 435(7) of the Insolvency Act 1986 given that Bridgewater was a company controlled by the Respondent together with his father, an associate of the Respondent in accordance with the provisions of Section 435(8) of the Insolvency Act 1986.

33. In view of the Tribunal's finding in relation to Complaint 3a, it follows that Complaint 3b is proved. For the avoidance of doubt, the Tribunal finds that the Respondent failed to introduce any safeguards at all in relation to the self-interest threat identified. The Respondent had a duty to introduce safeguards and by failing to do so, he acted contrary to Paragraph 19 of the Insolvency Code of Ethics.

34. In relation to Complaint 3ca, there is no dispute that payments totalling £24,366 were paid in referral payments to Bridgewater during the relevant period. Nor is there any dispute that the Respondent referred directors and employees of companies being liquidated by him to UKELC. It is not disputed that UKELC received commission from the sums received by directors and employees referred to it by the Respondent. The Tribunal, therefore, finds this complaint proved.

35. In relation to Complaint 3cb, the Respondent accepts that he did not disclose his interest in Bridgewater to any of the directors or employees he referred to UKELC. He left the issue of the disclosure of referral payments to UKELC. The Tribunal find this complaint proved.

36. In relation to Complaints 3ca and 3cb, the Tribunal finds that the Respondent's conduct was contrary to Paragraphs 55-56 and 60-62 of the Insolvency Code of Ethics and SIP 9.

37. In respect of Complaint 3 as a whole, the Tribunal is satisfied that the Respondent breached the Fundamental Principles of Objectivity and Professional Competence & Due Care and Professional Behaviour.

38. The Tribunal will now hear submissions on what Order, if any, to make.

**Order**

39. In coming to a decision in relation to what Order to make, if any, the Tribunal has taken into account the evidence before it, its findings and reasons, the submissions of the parties and the Common Sanctions Guidance.

40. Throughout its deliberations, it has borne in mind the principle of proportionality, taking into account the Respondent's interest and the public interest, and has exercised its independent judgement.

41. Having regard to Part 2 of the Common Sanctions Guidance, in the Tribunal's judgement, the breaches it has found proved in relation to Complaint 1 fall into the serious category and the breaches found proved in relation to Complaint 3 fall into the very serious category.

42. The Tribunal identified the following mitigating factors in this case:

- The respondent has an unblemished professional history going back to 1994;

- There are no concerns regarding his current compliance;
- He has engaged with the regulatory process;
- There was no financial loss to the estates or the public purse;
- He has apologised for and shown insight into his actions.

43. The Tribunal did not identify any particular aggravating factors in this case.

44. The Tribunal considered the Orders it could make in ascending order. It concluded that to take no further action would not be appropriate or proportionate in view of the finding that more than one of the Fundamental Principles of the Code of Ethics had been breached.

45. Taking into account the above factors as well as the Respondent's personal and financial circumstances, the Tribunal concluded that in respect of Complaint 1, the appropriate and proportionate Order is one of a Reprimand and a fine of £2,500.

46. The Tribunal concluded that in respect of Complaint 3, the appropriate and proportionate Order is one of a Severe Reprimand and a fine of £29,366 (£24,366 for the profit element and £5000 for the sanction element).

47. The Tribunal determined that the above Order properly reflects the seriousness of the Respondent's breaches taking into account the need to protect the public interest and the purpose of sanctions. It also serves to maintain and uphold the standards of conduct and the reputation of the profession and will appropriately correct the breaches identified and deter others from committing such breaches.

48. The Tribunal considered that a more severe order would be both inappropriate and disproportionate in all of the circumstances of this case.

**Costs**

49. The Tribunal considered the Association's application for costs. It took into account the Schedule of Costs and the submissions of both parties.

50. The Tribunal decided that an award of costs was appropriate in this case. In assessing the amount of costs, the Tribunal decided that it would be inappropriate to award costs on the basis the Mr. Wells is independent Counsel when he is, in fact, an employee of the Association. It also decided that the it would be inappropriate to award costs for the attendance of Ms Panayi at the hearing. Taking those matters into consideration, the Tribunal summarily assessed the amount of costs payable by the Respondent as £10,500.

51. Having taken into account submissions on the Respondent's financial circumstances, the Tribunal decided that in relation to the total amount of fines and costs (£42,366), the Respondent must pay the sum of £5000 within 20 business days of

the date of service of the Order and the outstanding sum of £37,366 by 30 March 2021. Under Rule 42 of the Rules, any sum outstanding after 30 March 2021 will be subject to interest at the annual rate of eight percent over the base rate.

52. In accordance with Rule 49 of the Rules, the Respondent has a right of appeal against the Tribunal's decision which he must exercise within 15 business days from the date the Record of Decision is served upon him.

53. That concludes the hearing.