Accountants' Defence & Advisory Services Ltd
The professional lifeline

Investment of reserves

In the last newsletter, we announced that with effect from 1st June 2017, we had increased cover in respect of disciplinary, appeal and regulatory proceedings from £10,000 to £25,000. The board of directors has decided that, in principle, we should establish four separate investment funds, each in the sum of £25,000. In the unfortunate event of a member of Accountants' Defence finding himself subject to disciplinary proceedings, one of these investment funds would be available to cover, hopefully, all of the costs of those proceedings.

Previously, the board has invested funds in stocks and shares and gold. These investments will now be disposed of and, instead, we will be investing in four collective investment bonds with Old Mutual Wealth. The board is pleased to announce that on 1st February 2018, Accountants' Defence acquired the first of four collective investment bonds. The other three bonds will be acquired in due course. Through the newsletter, the board will announce once each of these remaining bonds has been put in place.

Composition of tribunals

When I am asked what I do for a living and I reply that I represent accountants before disciplinary tribunals, the response is generally one of:-

Oh, you mean accountants sitting in judgment on one another.

That might be the perception, amongst the general public, but, in reality, it is quite different.

When I worked in the Professional Conduct Department, many years ago, and presented cases to the disciplinary tribunal, there were three chartered accountants, who sat with a legal assessor. There was no lay representation on the tribunal.

Subsequently, the system changed with the introduction of lay representation on the tribunal. There would still be two chartered accountants, one of whom would take the chair.

On 3rd October 2016, the byelaws were again amended. Although the tribunal continued with three members, only one is now required to be a chartered accountant. The remaining two are lay members and one of the two lay members acts as chairman. The tribunal continues to sit with a legal assessor.

The new system tends to cause much alarm and despondency amongst the defendants appearing before the tribunal. The usual question is how on earth will the majority members of the tribunal be able to reach a decision, having absolutely no experience of what goes on within the average accountancy practice. And there is no guarantee that the chartered accountant member of the tribunal will be a practitioner. His background might be commerce or industry or a partner in one of the larger firms. Furthermore, he may even be retired.

With regard to the Appeal Committee, the chairman and vice-chairman (who take it in turns to chair meetings of the Appeal Committee) are barristers. Usually, both are Queen's Counsel. However, the present vice-chairman is a senior barrister who has yet to take 'Silk'.

Appeal Committee evolved

Over the years, the composition of the Appeal Committee has evolved. When I was in the Professional Conduct Department, presenting cases before the Appeal Committee, the composition of the Committee comprised the President, the Vice President and the Deputy President of the Institute, together with two senior members of Council, more often than not, former Presidents themselves. As this was considered by many to be somewhat unsatisfactory, the composition of the Appeal Committee changed, with the chairman becoming a retired High Court judge. This was usually a retired Lord Justice of Appeal; a formidable character. He would sit with three senior members of the Institute, together with a lay member.

After some years, the system changed again. The present position is that the chairman is a practising barrister who sits with two members of the Institute, together with two lay members. It is always a committee of five. As the chairman is a barrister, there is no need (unlike the disciplinary tribunal) for there to be a legal assessor.

The other change which has taken place over the last couple of decades is that no member of the Council of the Institute can now sit on either the disciplinary or appeal tribunals.

Let us say for argument's sake that you are a partner in a small firm or you are a sole practitioner. You find yourself due to appear before the disciplinary tribunal with regard to complaints concerning your practising activities. You are concerned to discover that two out of the three members of the tribunal will be lay members and may not have any knowledge or understanding about the way that a chartered accountancy practice is operated. You are anxious to ensure that the chartered accountant member of the tribunal has a practising background. Can you insist that the chartered accountant should be a practitioner and can you object if the proposed member of the tribunal has always worked in commerce, industry, local government or higher education?

There is nothing in the byelaws or the regulations which defines what sort of background the chartered accountant member of the tribunal should have before considering a disciplinary case, perhaps where the allegations concern areas of particular expertise.

Legal authorities

I have looked at some recent authorities in the High Court, of which the following is a summary. In the case of Al-Fallouji v GMC (2003) UKPC 30, Mr Al-Fallouji, a surgeon, complained that there were no surgeons on the GMC disciplinary committee. His appeal failed on the basis that there were no technical issues for consideration arising as to surgical skills or techniques. However, this somewhat begged the question that if there had been such technical issues, would Mr Al-Fallouji have been successful?

In Dzikowski v GMC (2006) EWHC 2468, Dr Dzikowski complained that members of the tribunal were not specialised in his field of drug addiction. He felt that he should have been judged by specialists in the same area of work in which he had been practising for a number of years. His appeal was dismissed.

In Southall v GMC (2010) EWCA Civ 407, the Court of Appeal rejected Dr Southall's challenge that there was only one medical practitioner on the panel. The court held that there was no rule that there should be a medical panellist whose speciality matched that of the practitioner. Leveson LJ said that any issues requiring particular specialist knowledge should be dealt with through the calling of expert evidence on behalf of the defendant.

In Yeong v GMC (2010) 1WLR548, Sales J said that the panel is entitled to draw on its own experience and judgment and was not obliged to accept the assessment of the practitioner's expert. Furthermore, the panel had given reasons for its own view where those differed from that of the expert.

In R (Mehey and others) v Visitors of the Inns of Court (2014) EWCA Civ 1630, the Court of Appeal decided that, on occasions, it may be appropriate to appoint a barrister or lay representative with particular expertise that was not available within the pool of barristers of the Council of the Inns of Court. Nevertheless, that seems to be a decision specifically in relation to barristers and may not have general application.

Conclusion

So what can you draw from all of this? Firstly, there are no legal authorities which you can cite in support of your objection to the chartered accountant member of the tribunal not, in your opinion, having the necessary expertise. Secondly, if there is a technical issue which needs to be addressed, you, as the defendant, should appoint an expert, either a member of the Academy of Experts or of the Expert Witness Institute.

Thirdly, even if you do engage an expert, the tribunal is not obliged to accept his advice. Indeed, it may well be that if the defendant decides to call an expert, the Investigation Committee (which will be bringing the case against you) may call its own expert.

And, of course, the expert must give his evidence before the disciplinary tribunal. It is no good trying to call your expert before the appeal tribunal. Such evidence must be given before the tribunal of first instance.

The ICAEW is not unique with regard to the composition of its tribunals. Most, if not all, of the other accountancy bodies have changed the composition of their tribunals over the years. Today, lay representation is very much in the majority.

If the disciplinary tribunal gets it hopelessly wrong, doesn't understand the evidence or unreasonably rejects the evidence presented by the defendant and/or his expert, the defendant can appeal.

Are appeals, therefore, generally successful?

A recent appeal

Mr Roedeer had been an insolvency practitioner. He had drawn excessive remuneration in five cases, averaging some £18,362. Nevertheless, all of these cases dated from sometime prior to June 2005. No explanation (in the report) is given with regard to why such an historic matter did not come before the tribunal until last year.

The disciplinary tribunal decided that Mr Roedeer should be excluded and he was ordered to pay costs in the sum of £25,000.

Surprisingly, Mr Roedeer did not challenge the findings of the disciplinary tribunal, its order that he be excluded from membership or the costs order in the sum of £25,000. His appeal was solely based upon the contention that he did not have the means to pay any costs.

Mr Roedeer neither attended the disciplinary proceedings, nor his appeal. However, he insisted that he had provided a statement of his means. This was denied by the Investigation Committee.

When the matter came before the appeal tribunal, it was noted that Mr Roedeer had provided virtually no evidence to support his contention that he had no disposable income or assets. The only documents produced indicated that Mr Roedeer had made a modest taxable profit in 2014/15 and that he had paid no income tax in that or the following year. There was nothing with regard to Mr Roedeer's present income or his lack of assets.

The appeal tribunal was entirely satisfied that Mr Roedeer had not provided any reliable evidence in support of his assertion that he was unable to pay the costs order. Accordingly, his appeal was dismissed.

The Investigation Committee sought its costs. The Appeal Committee agreed that as the appeal had failed, Mr Roedeer should pay reasonable costs, which it assessed in the sum of £1,250.

The chairman of the appeal tribunal was a barrister, who sat with two chartered accountants and two lay members.

Comment: Mr Roedeer would have been well advised to have discussed the matter with a specialist lawyer.

The appeal of Mr Muntjac

Three complaints had been upheld by the disciplinary tribunal. Firstly, Mr Muntjac had told the Institute that his practice of paying client money into office account 'would be stopped'. However, seven years later, at a subsequent QAD visit, it emerged that that assurance had not been complied with.

The second complaint was that Mr Muntjac had paid client funds into office account.

The third complaint was that five consecutive annual returns to the Institute had been completed inaccurately, in that Mr Muntjac said that the firm did not handle client money, when he knew that it did.

The disciplinary tribunal had imposed a reprimand and a fine of £2,000, together with costs of £2,500. Payment of the fine and costs was to be by monthly instalments.

Mr Muntjac did not appeal against the finding, but challenged the sentencing order and the costs.

There were two grounds of appeal. The first ground was that the original claim for costs (over £10,000) included time spent in relation to an alleged breach of Regulation 22 (which turned out to be incorrect) and pursuing a failed head of complaint. The appellant considered that it was unreasonable for the costs to be reduced to as much as £2,500. The second head alleged that the disciplinary tribunal had not taken proper account of the costs which the appellant had incurred.

It is not clear from the reported decision as to whether the appellant was represented before the Disciplinary Committee. However, this seems unlikely as the appellant represented himself before the appeal tribunal.

The appeal tribunal considered that there had been a very significant reduction in the Institute's costs. In fact, these had been reduced by over 75%.

The tribunal was also satisfied that the disciplinary tribunal would have assessed the appellant's means and taken into account whatever sums he had spent in the course of the disciplinary process or have suffered by way of reduced income.

The appeal was dismissed and the appellant was ordered to pay a further sum of £1,500 in respect of the costs of appeal.

Comment: This was a quite extraordinary appeal against an amazingly lenient sanction imposed by the disciplinary tribunal. As the appeal tribunal stated in its reasons, these were serious matters. Not only had Mr Muntjac breached his undertaking over a period of seven years, but he had continued to pay client funds into office account and had then lied on five consecutive annual returns to the effect that he did not handle client money, when he did. Although he was not charged with dishonesty, the third complaint came very close to it. To have avoided a severe reprimand and a substantial fine was no mean achievement. Furthermore, to have secured a reduction in costs by over 75% was frankly astonishing.

It is difficult to understand what Mr Muntjac expected to achieve on appeal. If only he had sought specialist professional advice. He would undoubtedly have been advised not to appeal under any circumstances. He would then have saved himself £1,500.

The appeal of Mr Sitka

This was an appeal against an order of exclusion from membership, together with costs of £7,500. Mr Sitka faced eight separate complaints, which can be summarised as follows:-

1. Failed to obtain external hot file reviews within one month of the completion of eight audits in breach of a condition imposed by the Audit Registration Committee.

2. In his 2012 annual return, Mr Sitka failed to disclose five new audits.

3. In his 2013 annual return, Mr Sitka failed to disclose three new audits.

4. Failed to obtain the ARC's approval before accepting eight new audit appointments, in breach of a restriction previously imposed by the ARC.

5. Issued two audit reports when the audit was not conducted in accordance with ISA 210.

6. Issued two further audit reports when the audit was not conducted in accordance with ISA 210.

7. Failed to identify the beneficial owner of a limited company in breach of the Money Laundering Regulations 2007.

8. A similar complaint with regard to another client.

Mr Sitka represented himself before the Appeal Committee.

The appeal tribunal was satisfied that the Disciplinary Committee had correctly identified all aggravating and mitigating factors and had reached a reasonable decision. The appeal against exclusion was dismissed.

With regard to the costs, the appeal tribunal noted that some reduction had been made from the amount sought by the Investigation Committee. The appeal tribunal did not consider that the costs order was unreasonable.

As Mr Sitka lost his appeal, he was further ordered to pay costs of £1,250. However, the Appeal Committee agreed that the full costs should be paid by instalments.

Comment: I would have thought that this was very much a borderline case, which could have gone either way, namely either a severe reprimand or an order of exclusion. In addition to a severe reprimand, a fine could have been imposed as well. Although there can be no guarantee, I suspect that Mr Sitka might have had a better outcome had he been legally represented. That should have occurred at the Disciplinary Committee. It is not good tactics only to be represented by a lawyer at the appeal stage. The lawyer's task is so much more difficult before the Appeal Committee as that tribunal has to be satisfied that the disciplinary tribunal simply got it wrong.

An ACCA appeal

Accountants' Defence has a sister-company called Accountants National Complaint Services Limited, which provides identical services to the accountancy profession. However, the clients of ANCS Ltd are not members of Accountants' Defence and are required to pay a fee.

We were approached by a sole practitioner who had been threatened by the ACCA with the withdrawal of his audit registration. The matter had gone before their Admissions and Licensing Committee, which had ordered that audit registration should continue, subject to certain conditions including that all audit work should be hot reviewed and that staff should attend additional training. The member was satisfied with the outcome.

The ACCA decided to appeal the decision of the ALC. Mr Fallow (the practitioner) looked at his PII policy and found that he would be covered in respect of legal representation before the Appeal Committee. He approached ANCS Ltd and we agreed to act. However, the insurers preferred to instruct panel solicitors who, although experienced in PII claims, had little experience of dealing with the ACCA. Although ANCS had considerably more experience than these solicitors, insurers preferred to use panel solicitors and we lost the job.

These solicitors instructed Counsel who was successful before the Appeal Committee, which ruled that the ALC decision should remain. Counsel sought costs against the ACCA. Although the Appeal Committee agreed, in principle, that the ACCA should pay costs, they considered that the amount sought was too high. They felt that the time spent by Mr Fallow's solicitors of approximately 30 hours, was excessive. They were unhappy about Counsel's fees which appeared to be too high. The Committee ruled that no prior notice had been given of the detailed and complex arguments advanced by Counsel on the day of the hearing which had added time to the appeal and increased overall costs. The Committee felt that there should be a reduction as one of the arguments advanced by Counsel had not been successful and was considered to have been misconceived.

Costs were claimed in the sum of £8,500. An order was made in favour of Mr Fallow in the sum of £6,000.

Comment: It is interesting that solicitors should have spent 30 hours on what was clearly a straightforward matter. That might be explained by their relative inexperience. Secondly, it is surprising that the Appeal Committee made any costs order at all, bearing in mind that the High Court has said repeatedly that a successful litigant who is insured is not entitled to his costs on the basis that the insurance company is not a party to the proceedings.

Comment: All the above names are, of course, fictitious. The events actually happened.

An English composer society

I suspect that most members of Accountants' Defence have an interest in music, be it pop, jazz, folk, reggae, rap or classical music. And if it is classical music, the choice is enormous and varied. However, there is now a new English composer society, which your editor established last year to commemorate the life and work of the English composer Gustav Holst who lived from 1874 to 1934. If you are interested in the music of Gustav Holst, do please visit the society's website at www.holstsociety.org.

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