

APPLICATION ON PAPERS

CONSENT ORDERS CHAIR OF THE ASSOCIATION OF CHARTERED CERTIFIED ACCOUNTANTS

REASONS FOR DECISION

In the matter of:	Mr Alan Kirby
Considered on:	Wednesday, 26 May 2021
Chair:	Mrs Kate Douglas
Legal Adviser:	Mr Iain Ross
Outcome	Draft Consent Order approved Member Severely Reprimanded
Costs:	£4000.00

INTRODUCTION

1. This matter has been referred to the Consent Orders Chair for them to determine on the basis of the evidence before them whether to approve or reject the draft Consent Order.
2. The Chair had a report numbered pages 1-10, a case bundle numbered pages 1-559, a Costs Schedule numbered pages 1-2 and a letter dated 24 May 2021, informing Mr Kirby that the draft Consent Order would be considered by the Chair on 26 May 2021.

RELEVANT FACTS / PROVISIONAL AGREEMENT

3. Mr Kirby became a member of ACCA on 15 July 1993 and a fellow on 15 July 1998. By a signed provisional agreement between Mr Kirby and ACCA, Mr Kirby admitted the following allegations:

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Allegations

It is alleged that Mr Alan Kirby, an ACCA member and Director of Accountancy & Business Improvement Ltd:

1. Between October 2010 to March 2014, in giving advice to Client A, recommended that Client A (through his company or otherwise) participate in a firm investment scheme when:
 - 1.1 He failed to consider whether the scheme recommended was high-risk in terms of a suitable arrangement to avoid or mitigate tax liability;
 - 1.2 He had failed to advise Client A of such risks (if any);
 - 1.3 The scheme recommended may not, in all the circumstances, be suitable for Client A having regard to the matters referred to at 1.1 above and knowing in particular that Client A was risk averse
- 2 In respect of Allegation 1, Mr Kirby was in breach of (i) Section 120 (objectivity) and/or (ii) section 130 (Professional Competence and due care) of the Code of Ethics and Conduct 2012 to 2014.
3. Failed to fully and sufficiently disclose to Client A an arrangement Mr Kirby had in place to receive a referral fee in respect of the firm investment scheme referred to in Allegation 1, contrary to Section 220.11 of ACCA's Code of Ethics and Conduct as applicable in 2012 to 2014.
4. Failed to provide a new Letter of Engagement in relation to additional services provided by Mr Kirby on behalf of his Firm, namely tax planning advice, contrary to Paragraph 5 of Section B 9 of ACCA's Code of Ethics and Conduct as applicable between 2012 to 2014.
5. Failed to retain a signed Letter of Engagement, contrary to Paragraph 5 of Section B9 of ACCA's code of Ethics and Conduct as applicable between 2012 to 2014.
6. By reason of his conduct at 1 to 5 above, Mr Kirby is;

- 6.1 Guilty of misconduct pursuant to byelaw 8 (a)(i)
 - 6.2 Liable to disciplinary action pursuant to byelaw 8 (a)(iii).
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- 4. Mr Kirby provided Client A advise on “tax avoidance strategy”. In doing so, he failed to consider whether the recommended scheme was high-risk and Client A would not have invested in the scheme recommended to him by Mr Kirby had Mr Kirby told him of the high-risk nature of the scheme.
 - 5. Further, Client A was unaware that Mr Kirby had received a payment as an incentive for encouraging Client A to join the scheme. Mr Kirby agreed that he received such a fee and was unable to produce copies of any referral fee agreement which would show informed consent.
 - 6. Finally, Mr Kirby has consistently failed to provide ACCA with the new engagement letter with Client A, notwithstanding being requested to do so by letter from ACCA dated 11 November 2019.

The Member’s Response

- 7. On 26 March 2021, Mr Kirby, through his representative, admitted all of the above allegations. Subsequently, Mr Kirby agreed with ACCA for the disciplinary matter to be dealt with by way of a signed consent agreement. By the agreement, Mr Kirby admitted the allegations and agreed to a sanction of a Severe Reprimand and to pay costs to ACCA in the sum of £4000.00.

DECISION

- 8. The powers available to the Chair are to:
 - (a) Approve the draft Consent Order, in which case the findings on the allegations and the orders contained in it become formal findings and orders (CDR 8(11) and 8(14));
 - (b) Reject the draft Consent Order, which they may only do if they are of the view that the admitted breaches would more likely than not result in exclusion from membership (CDR 8(12));
 - (c) Recommend amendments to the draft Consent Order, if they are satisfied it is appropriate to deal with the complaint by way of consent but wish the terms of

the draft order to be amended (CDR 8(13)).

9. The Chair had regard to ACCA's Guidance for Consent Orders. Having carefully considered all of the material before them, the Chair was satisfied that the matter had properly been investigated by ACCA. The Chair was further satisfied that Mr Kirby had properly and willingly admitted all of the allegations.
10. In considering whether a Severe Reprimand was the appropriate sanction, the Chair noted that ACCA's Guidance for Disciplinary Sanctions (Guidance) has been considered and particularly the key principles which includes the following:
 - Protection of members of the public;
 - Maintenance of public confidence in the profession and in ACCA; and
 - Declaring and upholding proper standards of conduct and performance.
11. Another key principle is that of proportionality, that is, balancing the member's own interests against the public interest. Further, the aggravating and mitigating features of the case have been considered.
12. The aggravating factors are considered to be as follows:
 - Mr Kirby's conduct fell below the standards expected of a qualified ACCA member;
 - Mr Kirby failed to notify Client A of the "referral fee" or to provide any referral fee agreement in place at the time of the agreement, contrary to ACCA's Code of Ethics and Conduct;
 - Mr Kirby failed to provide Client A with a Letter of Engagement, contrary to ACCA's Code of Ethics and Conduct, and failed to retain any signed Letter of Engagement.
13. The mitigating factors were identified as being:
 - Mr Kirby took action shortly after becoming aware of the breach and that this was an isolated incident;

- Mr Kirby has been a Fellow of ACCA since 15 July 1998 and has a previous good record with no previous complaint or disciplinary history;
 - Mr Kirby fully cooperated with the investigation and regulatory process;
 - Mr Kirby ultimately fully admitted his conduct and took remedial action.
14. Taking into account all of the above factors, the Chair agreed that a severe reprimand was a proportionate sanction which sufficiently dealt with the public protection and public policy considerations.

ORDER

15. The Chair made the following order:

The draft Consent Order is approved.

Mrs Kate Douglas
Chair
26 May 2021