

CONSENT ORDERS HEARING

CONSENT ORDERS MEETING OF THE ASSOCIATION OF CHARTERED CERTIFIED ACCOUNTANTS

REASONS FOR DECISION

In the matter of: Mr Kenneth John McEnery

Considered on: Tuesday, 14 September 2021

Chair: Mrs Carolyn Tetlow

Legal Adviser: Ms Fiona Barnett

OUTCOME: Consent Order Approved

BACKGROUND

1. Mr McEnery's case comes before the Chair by virtue of a draft Consent Order that has been reached in this case between ACCA and Mr McEnery. The agreement sets out Mr McEnery's full admissions to the facts of the charges and his acceptance that he is thereby guilty of misconduct.
2. It is further stated in the draft Consent Order that an appropriate sanction in this case would be a Severe Reprimand.
3. The draft Consent Order was signed by Mr McEnery on 02 August 2021 and on behalf of ACCA on 13 September 2021. Neither ACCA nor Mr McEnery have subsequently withdrawn their agreement to the draft Consent Order.
4. The Agreement between ACCA and Mr McEnery, including ACCA's position on sanction, costs, and publicity, is set out in full below ending at paragraph 26:

Referral to Consent Orders Chair

Consent Order: Agreement

ACCA



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The Association of Chartered Certified Accountants (ACCA) and Mr Kenneth John McEnery agree as follows:

1. *Mr Kenneth John McEnery admits the following:*

Allegation 1

In proceedings before the County Court at Central London held on 10 October 2018, His Honour Judge Gerald was critical of the evidence given by Mr McEnery which he found to be '[In] many respects ...manipulative and rather disingenuous' and that Mr McEnery was '...incapable or unwilling to answer simple and straightforward questions in a simple and straightforward way'.

Allegation 2

Contrary to section 150.3 of ACCA's Code of Ethics and Conduct (as applicable in 2016), ACCA member Mr McEnery failed to behave with courtesy and consideration towards his fellow directors of Company A in that on or around 21 or 22 December 2017, he recorded his telephone conversations with them without their knowledge or consent.

Allegation 3

By reason of his conduct at 1 and 2 above, Mr Kenneth John McEnery is:

- (i) *In respect of Allegation 1 and/or 2, guilty of misconduct pursuant to bye-law 8(a)(i);*
 - (ii) *In respect of Allegation 2 only, in the alternative, liable to disciplinary action pursuant to bye-law 8(a)(iii)*
2. *That Mr Kenneth John McEnery shall be severely reprimanded shall pay*

costs to ACCA in the sum of £3,000.

Relevant Facts, Failings and/or Breaches

3. *Mr McEnergy has been a member of ACCA since 21 March 1996.*
4. *On 21 March 2001, Mr McEnergy became a Fellow of ACCA.*
5. *From April 2016 until December 2016, Mr McEnergy worked as Chief Financial Officer for Company A.*
6. *In July 2017, Mr McEnergy issued civil proceedings against Company A in the High Court of Justice, Companies Court.*
7. *On 13 September 2017, Mr McEnergy filed Amended Particulars of Claim against Company A, claiming:*
 - (1) *A Declaration that [Company A] holds 60 shares, or 5% of the share capital in [Company A] (whichever is greater), on trust for [him];*
 - (2) *An Order requiring [Company A] to issue the 60 shares, or 5% of the share capital in the Company (whichever is greater), to [him] forthwith (and to take all necessary steps to effect the proper vesting of such shares in [him] without delay);*
 - (3) *Alternatively, damages;*
 - (4) *Interest;*
 - (5) *Such further or other relief as the Court might deem appropriate;*
 - (6) *Costs*
8. *On 10 October 2018, the court dismissed Mr McEnergy's claims for a*

declaration and an order that Company A issue shares to him forthwith and ordered that he pay Company A's costs on the indemnity basis from 11 July 2017.

9. *In his approved judgment, His Honour Judge Gerald, stated:*

Generally, on credibility

54. *It will be clear from my findings that I have not found [Mr McEnergy] to be a reliable witness. In many respects, I found his evidence to be manipulative and rather disingenuous. There were various passages where he was portraying himself as the victim and trying to make out that the [Company A] had somehow progressively backed him into a corner because they were not prepared to pay him what he was demanding, which was anything up to £120,000 a year. The reason why that is disingenuous is because [Mr McEnergy] throughout knew that [Company A] could not pay the money so it was quite ridiculous for him to say that the [Company A] was painting him into a corner because it was a simple fact of life that [Company A] did not have the money to pay him what he wanted.*
55. *However, more fundamentally, it was [Mr McEnergy] who, for reasons which are very difficult from a commercial point of view to understand, or indeed to understand for somebody who is trying to put themselves in the strongest position possible would take, having paid £25,000 in order to get the full 5% share (prematurely, in terms of the agreement), it was he who told [Company A] that he was leaving on 6th December, and that was done, to put it mildly, at an inopportune time. Whether or not [Mr McEnergy] was being deliberately obtuse is something else, or acting for some other motive, I have no idea – but it was he who set matters in train and painted himself into the corner, finally shooting himself in the foot on 16th December 2016.*

56. *[Mr McEnergy] was manipulative, and not only just because of what I have already referred to, but at various stages he was demanding that the shares be issued to him because they were being issued to Person A and Person B and he wanted effectively to be treated the same as them. However, the reason that that was disingenuous and also rather manipulative is because [Mr McEnergy] knew full well that their agreement was that they would get the shares, no condition, no buyback, whereas he was only entitled to the shares on the footing that if he ceased to be full-time involved with the [Company A] before 31 December 2016 his shares could be bought back by the [Company A]. In other words, viewed in the cold light of day, they negotiated a better deal than [Mr McEnergy] entitling them to be allotted the shares without condition, whereas [Mr McEnergy] could be divested of any allotment to him pursuant to the April 2016 contract.*

57. *Throughout his oral evidence, [Mr McEnergy] was incapable or unwilling to answer simple and straightforward questions in a simple and straightforward way. Instead, he insisted on going into great, long, what he described as "contextual" exposes of the background to the answer which he was about to give. Then, when he gave the answer, one really could not understand what he was talking about and really what he seemed to be saying was that yes, he was leaving but that did not mean he was leaving. That, in a sense, is what his submissions were and, as I have said, this whole trial, it is a complete puzzle to me as to why [Mr McEnergy] has even thought it fit to issue proceedings given that it was his own evidence that he was leaving the full-time employment from which it would follow as night follows day that [Company A] was entitled to buy his shares back.*

10. *In response to ACCA, Mr McEnergy stated,*

I stand over the truthfulness of the facts represented in the Particulars of Claim, in my witness statement, and in the testimony I provided to the court. I would like to highlight that the court awarded me £50,000, plus interest. The court declined to award me the higher amount of £105,000 or shares in [Company A], which I sought. My solicitor advised me that I have a claim to either £105,000 or for specific performance - the shares. These claims failed on a point of law: I had agreed to work for [Company A] in 2017 on a part time basis, and agreed to remain as a director and secretary; however the judge deemed these arrangements to be 'out with' the contract terms, and so my case failed.

11. *On 21 December and 22 December 2016, Mr McEnery recorded telephone conversations between himself, Person A and other directors of Company A.*
12. *Person A and the other directors of Company A were unaware that Mr McEnery was recording the telephone conversations, and only became aware of the recordings in the course of the civil proceedings, and only after the date by which all evidence should have been disclosed, submitted and exchanged had passed.*
13. *Person A was "incredibly shocked" that Mr McEnery had made covert recordings and that he had only disclosed them after the deadline for formal disclosure within the civil proceedings instigated by him. Person A describes Mr McEnery's actions as:*

... disgraceful, sneaky and underhanded and I would not have expected this sort of devious behaviour from a work colleague, and even less a company director and a qualified professional accountant.

14. *In response to ACCA, Mr McEnery stated :*

By mid-December 2016, I had worked for [Company A] for almost 9 months, and I had received no payment for that work (my contract

stipulated that I would be issued shares in May 2016 – see contract attached 4.1). In mid- December Person C proposed that the company exercise the buyback clause of the contract (which was its right), but Person C also proposed to not pay me until some future indeterminate point, conditional on the company raising funding - this proposal was set out formally in writing a few days later – see 3.1 attached. I felt that Person C having reneged on the terms of the contract already was attempting to renege on it yet again. For that reason, I recorded 2 conference calls with other directors because I believed that my position would be misrepresented.

In advance of recording the conversations, I checked the legality of recording conversations. I learned that it was completely legal to record conversations, but not legal to publicise/share these conversations.

In March 2017, having left the company, and still having received neither payment nor shares, I engaged a solicitor. I discussed the recordings with my solicitor who advised me that as the recordings had been covert they were not admissible in court. I accepted this.

In May 2018 in the run up to the trial, my solicitor changed his advice. Initially, he advised me that the existence of the recordings, but not their content, needed to be disclosed. Soon after he advised me that the recordings themselves needed to be disclosed. At that point, the recordings were provided to the directors of [Company A].

At all points I followed the advice of my solicitor, although I admit that he changed his advice over time.

The member's response

15. On 29 August 2020, ACCA received an email from Mr McEnergy. Mr McEnergy requested that ACCA consider disposal of the matter by consent for the following reasons:

- *The allegations do not involve any element of dishonesty;*
- *The facts of the case are uncontested – I fully accept the underlying facts, by which I mean the fact that I made undisclosed recordings of meetings, and I am not contesting the court judgement;*
- *When I was offered a ‘deal’ by the person bringing the allegations whereby she would drop the allegations, I rejected it out of hand, so that ACCA could consider the allegations fully and properly;*
- *I had attempted to co-operative (sic) fully with ACCA in its investigation, been candid, and provided all relevant documentation in a timely fashion;*
- *As set out in my responses to the allegations, I believe there are extenuating circumstances in my case.*

16. *The Investigating Officer has conducted their investigation into the allegations against Mr McEnery in accordance with Regulation 8(1)(a) of the Complaints and Disciplinary Regulations 2014 (CDR) (amended 01 January 2020) and is satisfied that:*

- a) *they have conducted the appropriate level of investigation as evidenced by the enclosed evidence bundle and determined that there is a case to answer against Mr McEnery and there is a real prospect of a reasonable tribunal finding the allegations proved; and*
- b) *the proposed allegations would be unlikely to result in exclusion from membership.*

Sanction

17. *The relevant facts, failings and/or breaches have been agreed between*

the parties and are set out in the detailed allegations above together with the proposed sanction and costs.

18. *The appropriate sanction is **severe reprimand**.*

19. *In considering this to be the most appropriate sanction, ACCA's Guidance for Disciplinary Sanctions (Guidance) has been considered and particularly the key principles. One of the key principles is that of the public interest, 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.*

20. *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.*

21. *The **aggravating factors** are considered to be as follows:*
 - *The conduct which led to Mr McEnery being the subject of these proceedings fell below the standards expected of a qualified ACCA member;*

 - *His initial lack of understanding and insight into the seriousness of the acts/omissions and the consequences thereof.*

22. *In deciding that a **severe reprimand** is the most suitable sanction paragraphs C4.1 to C4.5 of ACCA's Guidance have been considered and the following **mitigating factors** have been noted:*
 - *Mr McEnery has been a member of ACCA since 1996 and has a*

previous good record with no previous complaint or disciplinary history;

- *Mr McEnergy has fully co-operated with the investigation and regulatory process;*
- *Mr McEnergy has ultimately admitted his conduct;*
- *Mr McEnergy has shown insight and has apologised for the conduct which led to the complaints raised against him.*

23. *ACCA has considered the other available sanctions and is of the view that they are not appropriate. ACCA considers that a **severe reprimand** proportionately reflects Mr McEnergy's conduct and the public policy considerations which ACCA must consider in deciding on the appropriate sanction. This is a public interest sanction due to the conduct bringing discredit to ACCA and the profession; and it conveys a message of the importance of fundamental standards of professional conduct.*

Costs

24. *Mr McEnergy has agreed to pay costs of £3,000.00.*

Publicity

25. *All findings and orders of the Consent Orders Chair shall be published naming the relevant person, as soon as practicable, and in such manner as ACCA thinks fit.*

26. *If the Consent Orders Chair is satisfied it is appropriate to deal with the complaint by way of Consent Order and the signed draft Consent Order is approved, it constitutes a formal finding and order. The Consent Orders Chair has the power to recommend amendments to the signed draft Consent Order and to subsequently approve any amended order agreed by the Parties.*

CHAIR'S DECISION

5. In reaching my decision, I have had regard to the bundle of documents provided, numbered pages 1 - 225, and the draft Consent Order set out in full above. I have also had regard to ACCA's Consent Orders Guidance, dated January 2021 and the document entitled, "*Consent orders, frequently asked questions*", dated January 2021.
6. I have borne in mind that, notwithstanding the parties having reached agreement on the above draft agreement, the final decision on whether the matter is appropriate to be dealt with by way of Consent Order is a matter for me to decide. I have the power to approve, reject or propose amendments to the draft Consent Order.
7. I first considered whether it is appropriate to deal with the complaint by way of a Consent Order in accordance with Regulation 8(1) of Complaints and Disciplinary Regulations 2014, (amended 01 January 2020). I am satisfied that it is appropriate to deal with this matter by way of Consent Order. The matter has been investigated by ACCA's Investigation Officer, who concluded that there is a case to answer and a real prospect of a reasonable tribunal finding the matters alleged proved. The Investigation Officer was also satisfied, and I agree, that the matters are unlikely to result in the exclusion of Mr McEnergy as a member of ACCA.
8. I next considered whether to approve the draft Consent Order. I considered the evidence and the facts of the case as set out in the bundle of documents and the draft Consent Order. I am satisfied that Mr McEnergy admits the allegations. Further, I agree that his actions, in the way in which he gave evidence in County Court proceedings, and also recorded telephone conversations with his professional colleagues without seeking their consent, fell seriously below the standards expected of a member of ACCA. I agree that this was sufficiently serious to amount to misconduct. I note, however, that in addition to the decisions of the County Court detailed in paragraph 8 of the draft Consent

Order above, Mr McEnery was also awarded the sum of £50,000 by the court. This is not mentioned in paragraph 8 of the draft Consent Order, which states:

“On 10 October 2018, the court dismissed Mr McEnery’s claims for a declaration and an order that Company A issue shares to him forthwith and ordered that he pay Company A’s costs on the indemnity basis from 11 July 2017.”

9. I also had regard to ACCA’s Guidance for Disciplinary Sanctions, (January 2021), and the aggravating and mitigating factors set out in the draft Consent Order. I agree with the aggravating and mitigating factors set out above. Having considered the sanctions in order, starting with the least serious, I am satisfied that a Severe Reprimand is an appropriate and proportionate sanction to maintain public confidence in the profession and to declare and uphold proper standards of conduct. I agree that taking no action, or imposing an Admonishment or Reprimand would be insufficient to uphold the public interest given the seriousness of the matters admitted by Mr McEnery. Mr McEnery’s acceptance of the matters alleged against him came late in the proceedings and his actions caused distress to those whose telephone conversations were recorded.
10. I therefore accept the content of the draft Consent Order in its entirety, and approve the draft Consent Order.

COSTS

11. ACCA is entitled to its costs and I agree with the proposal that Mr McEnery should pay £3000 to ACCA in costs.
12. Accordingly, I approve the draft Consent Order including the ancillary orders in relation to costs and publicity.

Ms Carolyn Tetlow
Chair
14 September 2021