

IN THE MATTER OF

A complaint made under sections 34(1)(a)
and 34(1AAA) of the Professional
Accountants Ordinance (Cap. 50) (“PAO”)

BETWEEN

[Company S]

COMPLAINANT

AND

The Respondents

RESPONDENTS

Members:

Date of hearing: 9th January 2012

REASONS FOR DECISION

1. This is a complaint made by [Company S] as Complainant against the Respondents, who are certified public accountants. Section 34(1)(a)(vi) of the PAO applied to the Respondents.
2. The particulars of the complaint as set out in a complaint document dated 26th January 2011 (“the Complaint”) from [Company S] to the Council of the Hong Kong Institute of Certified Public Accountants (“the Institute”) for consideration of the Complaint for referral to the Disciplinary Panels were as follows:-
 - a) First Complaint

The Respondents were in breach of section 34(1)(a)(iv) of the PAO in that they had been negligent in the conduct of their profession in acting as the joint and several liquidators of [Company C] (“the Company”) by failing to investigate and/or ascertain the assets of the Company in a proper manner; and

b) Second Complaint

The Respondents were in breach of section 34(1)(a)(vi) of the PAO in that they failed or neglected to observe, maintain or otherwise apply a professional standard in acting as the joint and several liquidators of the Company by failing to reply to the questions reasonably raised by the Complainant, being a creditor of the Company.

3. On 16th May 2008, the Complainant petitioned for the winding up of the Company. The Company was in debt to the Complainant a sum of around HK\$1.5 million at the material time. On 23rd July 2008, winding up order of the Company was granted and the Respondents were appointed by the Official Receiver as the Joint and Several Provisional Liquidators of the Company.
4. On 28th July 2008, [Solicitor Firm], solicitors acting for the Complainant, replied to the Respondents by (i) providing them with an address of a property (“the Property”) which was situated at Shatin and owned by the Company; and (ii) requesting them to convene the first creditors’ meeting.
5. On 13th August 2008, the Property’s mortgagee bank (“the Bank”) informed the Respondents that the Company’s debt owed to the Bank was around HK\$1.93 million. No information was available as to (i) whether the Bank had entered into possession of the Property; and (ii) the market value of the Property at the material time.
6. On 12th September 2008, the Respondents applied to the Court for the Summary Procedure Order (“SPO”) under section 227F of the Companies Ordinance on the ground that the net asset of the Company involved was less than HK\$200,000.00. SPO was subsequently granted. The Respondents had not informed the Complainant regarding the application or granting of the SPO. No creditors’ meeting was ever convened.
7. The Property was sold by the Bank on 27th February 2009 at a consideration of HK\$1.8 million. Documents provided to this Disciplinary Committee (“the Committee”) revealed that : (i) filing of Form M3 (Notification of Mortgagee Entering into Possession of Property) to the Companies Registry was made after the Bank had entered into a binding provisional sale and purchase agreement with the purchaser. Form M3 also disclosed that the Bank entered into possession of the Property before the winding up of the Company. However, such information was filed (or made known to the public) 10 months later which was in contrary to the statutory requirement of filing within 7 days; and (ii) instruction of the Bank to prepare a valuation report of the Property was made again after the entering of the provisional sale and purchase agreement.
8. On 6th April 2009, the Bank sent to the Respondents the statement of liabilities (which included the application of the sales proceeds) and proof of debt (collectively “the Information”) showing that the outstanding debt due by the Company after the sale of the Property was around HK\$0.36 million.

9. Since the reply letter from [Solicitor Firm] to the Respondents dated 28th July 2008, the Complainant or [Solicitor Firm] heard nothing from the Respondents regarding the progress of winding up or the disposal of the Property until on 17th November 2009 they discovered that the Property was sold. The Complainant then sent facsimile enquiry messages and made telephone calls to the Respondents but to no avail. The Complainant thereafter complained to the Official Receiver. The Respondents replied on 17th December 2009 informing, inter alia, that the Property was sold “without any surplus returned”. The Complainant then made further enquiries to the Respondents and Official Receiver regarding details of the disposal of the Property but to no avail. On 13th April 2010, the Complainant lodged a complaint to the Institute.
10. On 28th December 2010, the Institute replied to the Complainant that the Professional Conduct Committee (“the PCC”) of the Institute had investigated the case and considered that :
- a) the Respondents breached certain Code of Ethics for Professional Accountants in conducting the liquidation of the Company. A letter of disapproval in this respect was issued to the Respondents; and
 - b) the Respondents’ conduct were less than exemplary in that they did not show sufficient regard to the interest of the Complainant as a creditor in replying to its various enquiries about why there was no surplus returned to the liquidators after disposal of the mortgaged property of the Company.

The Committee considered that sub-paragraph (b) was to be treated as a warning given to the Respondents after their failure to sufficiently address creditor’s enquiries.

11. The Complainant, however, considered that its query regarding the disposal of the Property was still not answered. On 18th January 2011, [Solicitor Firm] requested the Respondents again for, inter alia, details of (i) debts secured by the Property; (ii) application of the sales proceeds; and (iii) the Respondents’ inquiries to the Bank. The Respondents had not acceded to [Solicitor Firm]’s request. The Respondents held the view that the case was closed and they had no obligation or duty to provide such information. The Complainant thereafter instituted the present proceedings.
12. After close of submission of each party’s Case and Reply and pursuant to the directions of the Committee, the Respondents filed their Witness Statements exhibiting, inter alia, for the first time, the Information, and the disapproval letter (collectively “the New Documents”). Having perused the New Documents, the Complainant was satisfied in that their long awaited answers were finally given. The Complainant therefore withdrew the First Complaint but asked for costs because of the Respondents’ late submission of the New Documents.

13. The Committee considered that the Complainant's concerns or queries regarding the Company's debt owed to the Bank and the application of the sales proceeds of the Property ("the Concern") were so clear and unequivocal ever since they discovered that the Property was sold up to the time of instituting the present proceedings. The Respondents had made replies to the Complainant in the interim period but such replies could only be treated as a refusal to answer the Concern. The Concern was finally answered when the Respondents disclosed the New Documents in their Witness Statements. The Complainant's withdrawal of the First Complaint was reasonable in that it saved time and costs in the further conduct of the case.

14. During hearing, evidence from the Respondents did show that there was deficiency in their handling of the subject liquidation case. However, as the First Complaint was withdrawn, no evidence in this respect was considered by the Committee in determining whether the Second Complaint was proved or not.

15. "Professional Standard" referred to under section 34(1)(a)(vi) of the PAO shall mean any (i) statement of professional ethics; or (ii) standards of accounting, auditing and assurance practices. In this respect, the Complainant drew the Committee's attention to, inter alia, the following Insolvency Guidance Notes ("IGN") issued by the Institute :
 - (a) IGN (2) – A liquidator's investigation into the affairs of an insolvent company
 3. This IGN concentrates on the duty of a liquidator of an insolvent company to investigate the company's affairs. The liquidator should carry out a minimum standard procedure in carrying out this duty, whether there are assets or not, and creditors should be confident that the investigating duty has been properly discharged.

 - (b) IGN (3) – Preparation of insolvency office-holders' receipts and payments accounts
 3. The purpose of this Guidance Note is to :
 -
 - Set out best practice with regard to the presentation of financial information to creditors and other interested parties in a manner that is useful to the reader.

 21. When assets subject to charges are sold by the chargeholder or other person with a legal right to do so (for example, an execution creditor), or on any such person's instructions, the net amount, if any, received should be shown in the account, with the gross realisation(s), the costs of realisation, and the amount retained shown separately, either by way of narration or in a note to the account. When assets are realised in these circumstances and no monies are received by the office-holder, the gross realisation and

related costs should be shown, either in the narrative column or by way of a note, and “nil” realisation included in the account.

16. The Committee agrees that the Concern was a reasonable enquiry, especially made or requested by the Complainant, being the petitioner and possibly the major unsecured creditor. The Committee further considers that as a liquidator, one has to deal with not only the creditors and debtors, but also the Court and the Official Receiver. There is always an element of public interest involved. Any suspicion that a liquidator has not exercised due care and attention in the winding up procedures is of great concern to the Court and the Official Receiver.
17. The Committee can hardly accept that details of debt owed by the Company to the Bank and the application of sales proceeds were private and confidential information of the Bank and as such the disclosure of the same to creditors in a winding up case would require consent of the Bank. The Respondents were erroneous in this respect. The Committee agrees that there is no such norm that one should not have any expectation that there would be any surplus return for secured property being sold under winding up/bankruptcy cases. The Committee accepts that “no surplus money returned” as replied by the liquidators should not deprive creditor’s right to make further enquiry regarding details of the disposal of secured properties. Provision of such information to creditors conforms to such professional standard as stipulated above. Such practice also serves to give confidence to the creditors that the investigating duty has been properly discharged.
18. The whole case shows that the Respondents had not learnt their lesson after the warning given to them by the PCC. The Respondents erred again in treating the disapproval letter as an end to the Complaint. The Respondents’ persistent failure to provide such information to creditors when they ought to do so as a matter of good practice and in compliance with the IGN originated from their error in judgment. They continued to maintain such wrong judgment at the hearing and submitted that such information was not disclosable without the Bank’s consent.
19. Having considered all the facts and materials presented to the Committee, including submissions from the Respondents and the Complainant and matters discussed aforesaid, the Committee concludes that the Second Complaint was proved.
20. For sanction, the Committee bears in mind the need to have a fair balance between the general interest of the public and the impact upon the Respondents’ life. Besides the public interest element, it is of equal importance to consider the Respondents’ personal circumstances, the circumstances in which the said refusal or failure occurred and the seriousness or consequence of such non-compliance. Lord Collins said in an appeal case concerning disciplinary proceedings in the UK accountancy profession : “The primary purpose of professional disciplinary proceedings is not to punish, but to protect the public, to maintain public confidence in the integrity of the profession, and to uphold proper standards of behaviour.”

21. The Committee accepts that the Respondents' failure was a minor one. However, repetition of the warning is insufficient and inappropriate. Having considered recent disciplinary decisions, the Guideline to Disciplinary Committees for Determining Disciplinary Orders, the Committee considers that the sanction should be no more than an order of reprimand is appropriate in all the circumstances of the case. Further, as costs follow the event, the costs of the Clerk and that of the Complainant should be paid by the Respondents subject to the following consideration.
22. The costs of the Clerk submitted in the sum of HK\$57,984.90 are reasonable. However, taking into account the minor nature of this case and the fact that : (i) members of the Institute are entitled to a discount on the standard rate of the hearing venue; and (ii) the non-utilization of certain facilities e.g. projector and discussion rooms reserved for the Complainant and the Respondents, the Committee decides to curtail the costs of the Clerk to HK\$40,000.00.
23. The costs of the Complainant require discussion. The professional rate of the handling solicitor charged at HK\$3,500.00 per hour is on the high side of the High Court scale. In view of the minor nature of the case and the solicitor was not exercising particular expertise or taking unusual responsibility, a rate of HK\$2,500.00 per hour is allowed. [Solicitor Firm]'s involvement in the Complainant's case can be traced back to at or around 16th May 2008 when the Complainant petitioned for the winding up of the Company. [Solicitor Firm] was conversant with the case all along. In view of the minor nature of the case, the level of work and only costs incurred after the Complaint was made to the Institute should be allowed, the reasonable and necessary hours of work for attendance on client, other side, counsel and clerk to the Committee should not be more than 10 hours. For the same reasons aforesaid, the reasonable and necessary hours of professional work in perusing documents, preparing the case, reply, checklist and witness statement, preparing and attending the hearing should not be more than 16 hours. The costs of Counsel fee and photocopying charges in the respective sum of HK\$25,000.00 and HK\$5,997.00 are allowed. In summary, the costs of the Complainant in the total sum of HK\$95,997.00 are allowed.
24. The Committee orders that:-
 - a) the Respondents be reprimanded under section 35(1)(b) of the PAO; and
 - b) the Respondents do pay the costs and expenses of and incidental to the proceedings of the Complainant in the sum of HK\$95,997.00 and that of the Clerk in the sum of HK\$40,000.00 under section 35(1)(iii) of the PAO. The said costs and expenses shall be borne equally between the Respondents.

Dated the 3rd day of February 2012

IN THE MATTER OF

A complaint made under sections 34(1)(a)
and 34(1AAA) of the Professional
Accountants Ordinance (Cap. 50)

BETWEEN

[Company S]

COMPLAINANT

AND

The Respondents

RESPONDENTS

Before a Disciplinary Committee of the Hong Kong Institute of Certified Public Accountants (“the Institute”).

Members:

Date of Hearing: 9th January 2012

ORDER

At the hearing on 9th January 2012, the Disciplinary Committee found the following complaint against the Respondents proved:

The Respondents were in breach of section 34(1)(a)(vi) of the Professional Accountants Ordinance in that they failed or neglected to observe, maintain or otherwise apply a professional standard in acting as the joint and several liquidators of [Company C] by failing to reply to the questions reasonably raised by the Complainant, being a creditor of [Company C].

IT IS ORDERED that:-

1. the Respondents be reprimanded under section 35(1)(b) of the Professional Accountants Ordinance; and
2. the Respondents do pay the costs and expenses of and incidental to the proceedings of the Complainant in the sum of HK\$95,997.00 and that of the

Clerk in the sum of HK\$40,000.00 under section 35(1)(iii) of the Professional Accountants Ordinance. The said costs and expenses shall be borne equally between the Respondents.

Dated the 3rd day of February 2012