

**IN THE MATTER OF THE INTELLECTUAL PROPERTY REGULATION
BOARD COMPLAINT REVIEW COMMITTEE**

**Memorandum of a meeting of the Complaint Review Committee of IPReg
held on 28 January 2020**

In the matter of

Mr Y

(Complainant Allegations 1 - 5)

INTELLECTUAL PROPERTY REGULATION BOARD

(Complainant Allegation 6)

- and -

**(1) DR. KEITH BODEN, Registered Patent Attorney
(2) FRY, HEATH & SPENCE LLP, Registered Body
(Patent Attorney Register)**

(Respondents)

The meeting took place at 23 Essex Street, London, WC2R 3AA.

Chair:

Steve Gregory (Lay member and chair)

Members:

Alan Kershaw (Lay member)

Keith Howick (Professional member)

Legal Advisor:

Tim Grey (Barrister)

On 3 December 2019 the Complaint Review Committee (CRC) met to consider the case. In so doing it made the following findings:

Background

Dr. Boden, (“the first Respondent”), is and was at all material times a Registered Patent Attorney, registered with the Intellectual Property Regulation Board (“IPReg”). During the relevant period he was one of three full time attorneys working at Fry, Heath and Spence LLP (“the second Respondent”), itself a Registered Body with IPReg.

Mr Y (“the Complainant”) was a client of the first and second Respondents, and it is that relationship that gives rise to his complaints.

On 3 December 2014, having retained the services of the Respondents in relation to an application for a patent for a tea making process, the Complainant filed, through the Respondents, a new UK patent application at the UK Intellectual Property Office (“IPO”).

Between 2014 and December 2016 there then followed a series of exchanges between the IPO, previous FHS attorneys & the Complainant.

In 2018, the Complainant was keen to obtain an examination report swiftly, and instructed the Respondents to seek accelerated examination of his application. In consequence, on or around 9 March 2018 he had paid the Respondents an additional £160.

On 13 March 2018, the Respondents did indeed request accelerated examination. The application for accelerated examination was accepted and confirmed to the Respondents by letter from the IPO dated 23 March 2018 and received and date stamped by the Respondents on 26 March 2018. By further correspondence of 23 March 2018, the IPO examiner sent the examination report to the second Respondent’s professional address. The deadline for a response to the examination report was given as 23 May 2018.

It is not in dispute that by email of 26 March 2018, the first Respondent told the Complainant that the application for accelerated examination had been accepted. However, the Respondents did not tell the Complainant about receipt of the examination report at this stage. In later correspondence the Respondents contend this could have been because the report had not yet been received by them.

In the period 27 March 2018 to 18 May 2018, the first Respondent took an extended leave of absence. Initially he took vacation to 13 April, before a (long deferred) surgical operation on 18 April. He then had approximately 4 weeks recovery time, before returning to work.

By letter of 7 June 2018, the first Respondent sought, from the IPO, an extension of two months to the 23 May deadline. It is clear that regardless of the intention behind such a request, no written authorisation for such action was sought or obtained from the Complainant, and it appears to be agreed by all parties that the Complainant was not aware of the application for an extension at the time.

Whilst there is no formal documentary evidence that the IPO granted the request, it is generally accepted that 2 month extensions are considered to be a right and the "Latest date of Reply" to the IPO examiner was revised to 23 July 2018.

Later on the same day (7 June) the first Respondent emailed the Complainant attaching the examination report and setting out the deadline for response as 23 July 2018. The first Respondent did not identify that this was a deadline that had been extended.

The copy of the report provided by the first Respondent to the Complainant on 7 June 2018 had been amended by the first Respondent or an employee of the second Respondent, such that the date on each page of the report was removed and the original "Latest Response" date of 23 May was changed to 23 July.

The first Respondent continued to correspond with the Complainant in July 2018. At no point was the Complainant informed that an extension of time had been sought and granted, or of the original date of the examination report.

On 22 July 2018 the Complainant sought to make additions to his response, and complained to the first Respondent that: *"I know this is fairly last minute, but after 2 years of waiting and a delayed fast-track (even after paying extra), they didn't give much of a window for me at this bad time."*

In his reply the first Respondent did nothing to communicate the nature of the delays to the Complainant. Rather he portrayed the 23 July date as a hard deadline. It was a hard deadline only by reason of the extension sought unilaterally by the Respondents.

In consequence of the difficulties the Complainant had with the deadline, he contacted the IPO and sought an extension. He was informed that an extension of 2 months had already been granted and so only a discretionary extension could be permitted. This appeared to be the first occasion upon which the Complainant was aware of the full history and the accurate dates of the examination report.

Subsequently a further, discretionary extension was granted, to 23 August 2018.

On 2 August 2018 the Complainant informed the Respondents that he had instructed a new attorney, Mr. MacLean of Downing Associates ("Downing

IP”), to prosecute the application. As part of that notification, the Complainant instructed the Respondents to “*forward all relevant files and documents*” to Downing IP. Later that same day the PA to the first Respondent sent a copy of the application to Downing IP in word format. This prompted Mr. MacLean to ask for the full file.

On 22 August the first Respondent emailed Mr. MacLean and explained he had no further prosecuting documents that were not available on the IPSUM system.

By letter of 10 September 2018, the Complainant formally complained to Mr. Lock of the second Respondent regarding the process undertaken by the Respondents in making the application. By separate letter he made a Subject Access Request (SAR) for further documents relating to the application.

By letter of 24 September 2018 the second Respondent replied to the complaint and SAR. In short, the second Respondent confirmed that there had been delay, that the dates within the examination report had been altered “*so as to avoid causing concern,*” but that all the Complainant’s rights were maintained, and his interests put foremost.

The second Respondent provided some further documents, but was unable to provide a full file as: “*...after a patent application had been transferred to the care of another firm, we do not keep a physical file...*”.

By letter of 12 November 2018, the Complainant made his initial complaint to IPReg, which was advised to the Respondent in a letter, dated 4 July 2019. By email of 1 August 2019 the first Respondent replied to the complaint. By email of 7 August 2019 the first Respondent provided specific answers to questions posed by IPReg. By email of 16 August 2019 the Complainant made further points in response to the reply.

Admissibility under Rule 8 of the Patent Regulation Board and Trademark Regulation Board Disciplinary Procedure Rules 2015

The Complaint Review Committee (“CRC”) considered the admissibility of the complaint in accordance with Rules 8.2 and 8.3.

The CRC concluded that having regard to Rules 8.3(a) (i) and (ii), the complaint was in time, considering that the complaint was raised formally on 12 November 2018, and that the matters giving rise to the complaint occurred from no earlier than 3 March 2018 on an ongoing basis until around 10 September 2018.

The subject matter of the complaint fell within IPReg’s jurisdiction as it raised issues as to the professional conduct of the Respondents, one of whom was a Registered Patent Attorney, the other a Registered Body.

The CRC accordingly determined that the complaint was an admissible complaint within the meaning of Rule 8.

Rule 9 – Review and assessment of a prima facie case

The CRC considered the meaning of a “*prima facie case*” and adopted the test set out in case law, in particular in the case of *R v Galbraith [1981] 1 WLR 1039*. For the CRC’s purposes, “*prima facie*” therefore means answering the question: “Is there sufficient evidence taken at its highest to amount to a case to answer?”

The CRC then turned to consider the material before it, and in particular the Allegations framed by IPReg. It chose to consider each of these in turn, in the context of the evidential test set out at Rule 9.2(a) of the Disciplinary Procedure Rules (“the Disciplinary Rules”).

Allegation 1

“That by not informing the Complainant of receipt of the Examination Report on or around 23 March 2018, and then by not meeting the latest date for reply of 23 May 2018, you/your firm failed to put his interests foremost and also failed to carry out your professional work in a timely manner and with proper regard for standards of professional service and client care, in breach of Rules 5 and 6 of the Rules of Conduct for Patent Attorneys, Trade Mark Attorneys and Other Regulated Persons (“the Rules”).”

The CRC noted that the underlying facts of this allegation were not in dispute. In particular, all parties agreed that the Complainant had not been notified of the receipt of the examination report on or around 23 March 2018, and indeed had not been informed of it until after 23 May 2018, when the initial deadline had passed (albeit extended by the first Respondent).

The CRC noted that this coincided with a period of ill-health experienced by the first Respondent, and on its face a failure of the second Respondent to ensure continuity of service over the crucial period March - May 2018.

The CRC concluded that there was therefore sufficient evidence to show that the Respondents had failed to carry out their work in a timely manner. In apparently failing to explain to the Complainant the difficulties they faced, both Respondents demonstrated a lack of proper regard for the standards of professional service and client care required of them, by the Rules and by the profession of Patent Attorneys.

The CRC therefore found there was sufficient evidence to satisfy it that there was a case to answer in relation to Allegation 1 in so far as Rule 6 was concerned.

The CRC then applied its mind to the alleged breach of Rule 5 and whether the conduct could, taken at its highest demonstrate a lack of integrity. The

CRC concluded that whilst it appeared the Respondents had failed to undertake work in a timely manner, the circumstances did not demonstrate any wilful or reckless disregard for the Complainant or his interests. Indeed, taken at its highest the first Respondent had failed to ensure continuity of care when he was taken ill, had failed to keep his client informed and had failed to meet an initial deadline. However, he had preserved his client's rights.

The second Respondent had failed to ensure continuity of representation in the absence of the first Respondent through ill-health.

In the circumstances of the relatively short period involved, the first Respondent's ill-health and the steps taken to extend time, the CRC did not consider Allegation 1 disclosed a case amounting to a breach of Rule 5.

It therefore determined that so far as Allegation 1 is concerned in relation to Rule 6 there is a *prima facie* case for both Respondents to answer, but in relation to Rule 5 there is not.

Allegation 2

"That in deliberately making alterations to the Examination Report issued by the IPO on 23 March 2018, which you then disclosed to the Complainant on 7 June, and by not also disclosing the covering letter from the IPO Examiner you sought to and did mislead the Complainant as to the status of his patent application, in breach of Rules 5, 6 and 8 of the Conduct Rules."

The CRC noted that there was no material dispute as to the facts in relation to this Allegation. The Respondents accepted making alterations to the report such that the deadline date was amended and the date of the report itself was removed.

The emails sent thereafter, and in particular that sent by the Complainant to the first Respondent on 23 July 2018 at 11.59 did, in the CRC's view, add considerable support to the contention that the Complainant was materially misled by the changes made to the report by the Respondents (whether by the first Respondent himself or by an employee of the second Respondent at the request/in the knowledge of the first Respondent).

The CRC determined that the evidence taken as a whole supported the contention that on its face it had been the intention of the Respondents to mislead the Complainant as to the date upon which the examination report was actually received and the date by which a response was initially due.

Taking the evidence before it at its highest, the CRC was clear that in relation to Rule 6 there was sufficient evidence to show that there had been a further failure to that at Allegation 1 (above) to have proper regard for standards of professional service and client care.

In so far as Rule 8 was concerned the CRC was concerned that the intention behind Rule 8 was to protect client confidentiality, chiefly in relation to third parties. However, it noted that it required of a regulated person (or by extension a regulated body) to disclose to a client “*all relevant information of which he is aware.*”

It was clear that the Respondents accepted that material information as to deadlines was not disclosed to the Complainant at the relevant time, or indeed at all, such that it appeared to the CRC to be a surprise to the Complainant when he discovered the true position on 23 July 2018. The CRC therefore concluded that there was sufficient information to amount to a case to answer in relation to Allegation 2, as a breach of Rule 8.

The CRC then considered whether the evidence supported the assertion that the conduct alleged could amount to a breach of Rule 5 (lack of integrity). In finding that there was evidence demonstrating that the Respondents had actively sought to doctor documents in order to create a false impression for the client, the CRC was clear that there was the potential for a finding that the conduct complained of did not amount to a steady adherence to the ethical standards of the profession. It therefore determined that there was sufficient evidence to amount to a *prima facie* case in relation to Allegation 2 as a breach of Rule 5 in relation to the acts and omissions of both Respondents.

The CRC therefore determined that there is a *prima facie* case for both Respondents to answer in relation to the entirety of Allegation 2.

Allegation 3

“That in correspondence sent to the Complainant, you/your firm sought to further disguise the true position with regard to the application for accelerated examination and the Examination Report, in breach of Rules 5, 6 and 8 of the Conduct Rules. Examples of such correspondence being:

- *Email 7 June 2018 at 19:03*

- *Email 9 July 2018 at 13:41*

- *Email 18 July 2018 at 08:58*

- *Email 22 July 2018 at 13:24”*

At the outset the CRC considered the precise wording of the proposed Allegation. It considered that the use of the word ‘*further*’ conveyed a presumption that a deception materially different from that alleged at Allegation 2 had been perpetrated. The CRC could find no evidence of any

such *'further'* deception. Rather it preferred the wording *'continue to'* and therefore amends the allegation accordingly. Thereafter it considered the allegation against this amended wording.

In considering the evidence the CRC took careful note of all the correspondence between the parties, not simply the emails listed in the allegation. However, it did consider these specifically. In relation to the email of 7 June 2018 it noted that the email made no explanation of why 23 July 2018 was the date set for response to the examination report and made no mention of any extension having been sought. This was, on its face, far from a full and frank explanation of what had occurred in circumstances where such an explanation could reasonably have been expected.

The emails of 9 July and 18 July 2018 involved a further promulgation of the fictitious position by the first Respondent. 23 July was, in both letters, portrayed as a hard deadline, which indeed it was, without any explanation as to why. The natural implication on the face of it was therefore that this was the first date given by the IPO for the reply to the examination report.

The email of 22 July 2018 likewise perpetuated the myth that the 23 July deadline was the original deadline and that the report had been provided on 7 June. The CRC considered that the email from the Complainant and the response from the first Respondent provided overwhelming support for the contention that the Respondents had sought to disguise the true position. The email from the Complainant clearly called for an answer from the first Respondent that addressed what the Complainant considered to be an extremely short initial timetable. It was not the initial timetable at all, something the first Respondent knew. On the face of the evidence before it the CRC could find no evidence to show that any attempt was made by the Respondents to correct the Complainant's misapprehension.

The CRC was in little doubt that, if proved, the Allegation would amount to a breach of Rules 6 and, in so far as it applied to information provided to a client by a member, Rule 8.

Further, if on the facts the fact-finding tribunal were to conclude that there had been a deliberate or reckless attempt to mislead the Complainant during the course of the correspondence from June onwards, the CRC was in little doubt that such would amount to a breach of Rule 5.

In relation to the underlying facts, the CRC determined that, by inference if nothing else, there was sufficient evidence to demonstrate that the second Respondent either knew or should have known of the attempts to disguise the true position. In omitting to prevent or otherwise forestall the continuance of the 'disguise' the evidence demonstrates to the required standard that the second Respondent has a case to answer in relation to each of the Rules outlined above.

The CRC therefore determined that there is a *prima face* case for both Respondents to answer in relation to the entirety of Allegation 3.

Allegation 4

“That by not providing a complete copy of the Complainant's file as requested by him on 2 August 2018 and 10 September 2018, you/your firm failed to co-operate with the Complainant and/or his new (at the time) representative, Mr. MacLean of Downing IP, ensuring that client's interests were protected on the change of responsibility, in breach of Rule 9 of the Conduct Rules. Particular features in support of this allegation are

- the initial reaction in providing a Word document or file containing only the description and claims filed in respect of the patent application.*
- the failure to provide the Examination Report either as issued by the IPO on 23 March 2018 or as sent to the Complainant on 7 June 2018.*
- the Work History Report, which seems to bear little relation to the totality work done and time and cost incurred in connection with your firm acting on Mr. Yardim's behalf.*
- Overall, the failure to produce a physical file of papers for Mr. Yardim's patent application or to be able to reproduce a complete copy of the file from electronic records held if a physical file was not kept by/no longer available to you.”*

Again, the underlying facts relating to Allegation 4 are not in dispute. There were numerous requests in one form or another from the Complainant and from his new Attorneys for documents.

The only documents provided were those appended to the letter sent by the second Respondent on 24 September 2018 and the word copy of the application itself, provided on 2 August 2018.

On the face of the evidence available to it, it was clear to the CRC that there had been numerous other documents generated by the Respondents during the course of their professional relationship with the Complainant in relation to his application. The invoices received and paid by the Complainant throughout 2015 and 2016 attested to the work done by the Respondents in drafting and preparing documents.

In response to the requests made by the Complainant for documents the Respondents maintained they no longer had a physical file as it had been destroyed when new attorney had been appointed.

The CRC noted that the request for documents came in the same email as the notification to the Respondent that a new Attorney had been appointed. If

the Respondents were right in their account, the decision to destroy the file was taken at a time when there was an extant request for documents.

Further, the second Respondent's own terms and conditions required the physical file to have been kept for a minimum of 6 years following the determination of the application. No determination had taken place when the requests were made.

On the basis of the evidence before it the CRC concluded that there was clear and cogent evidence capable of demonstrating that there had been a breach of Rule 9.

The CRC further considered that on the face of the evidence a further breach of Rule 6 was disclosed in that the Respondents had contravened their own terms and conditions and in so doing had failed to ensure their client's best interests were protected.

The CRC therefore determined that there was a *prima facie* case for both Respondents to answer in relation to Allegation 4 in so far as it disclosed a breach of Rule 9, and in addition Rule 6.

Allegation 5

"That by failing to resolve the Complainant's complaint to his satisfaction, for the reasons he sets out in his letter dated 12 November 2018, you/your firm have failed to operate an effective complaints procedure in breach of Rule 12 of the Conduct Rules."

The CRC took careful note of the wording of Rule 12. It noted that Rule 12 requires registrants to have in place a complaints policy, and to provide it to a complainant, along with information about his/her rights to complain to the Legal Ombudsman. It also requires registrants to keep copies of complaints they receive.

The CRC could find no evidence that demonstrated that either Respondent had failed in the duty they owed to the Complainant under Rule 12. Indeed to the contrary, the complaints policy had been provided which set out the Complainant's rights in relation to the Legal Ombudsman. Whilst the response to the complaint did not appear to comply with the second Respondent's complaints policy such non-compliance did not of itself breach the terms of Rule 12.

The CRC therefore found there was insufficient evidence to amount to a *prima facie* case for either Respondent to answer in relation to Allegation 5 and therefore no case for either Respondent to answer.

Allegation 6

"The evidence points to a lack of costs information (expenditure incurred or to be incurred) being given to the Complainant at appropriate stages in the course of his patent application, or at all in fact. There are the original emails in 2014 which make no reference to costs other than by way of requiring an advance payment of costs to be made. The Terms and Conditions...are silent on this subject. The substantive invoice dated 3 December 2014 seems unsupported by any evidence of prior costs information having been given to the Complainant. In fact, the only evidence of provision of costs information is your email to the Complainant dated 9 March 2018 in relation to the cost of making an application for accelerated examination. Accordingly, please will you also respond to an allegation that you (which includes Fry Heath Spence) have not met the requirements of Rule 6 of the Rules of Conduct – Client Care and Service in relation to giving the Complainant periodic updates on expenditure incurred or to be incurred other than by way of issuing invoices to him, seemingly yearly 2014- 2018."

The CRC carefully considered the terms of Rule 6, and the evidence before it in relation to costs. The CRC noted that the Complainant obtained a response from one or other of the Respondents in relation to any costs query raised. He received regular invoices and fulsome responses to costs enquiries and estimates.

The CRC noted that there was no evidence of monthly statements before it, as required by the second Respondent's terms and conditions, and as reported in Dr Boden's email to IPReg, dated 5 September. Whilst no such evidence was provided by either of the parties, such a failing would not necessarily constitute a breach of Rule 6.

Further the CRC noted that the Complainant had raised no complaint regarding costs and that instead this complaint was brought by IPReg. In the absence of such a complaint from the Complainant there was no evidence he himself had been unhappy about the provision of information to him by the Respondents, relating to costs.

The CRC therefore concluded there was insufficient evidence before it to amount to a *prima facie* case for either Respondent to answer in relation to Allegation 6.

Rule 9.2(b) & 9.3 – Proportionality

The CRC was of the view that there was a *prima facie* case in respect of an alleged breach of Rule 6 of the Rules of Conduct as described in Allegation 1 above, an alleged breach of Rules 5, 6 and 8 of the Rules as described in Allegation 2 above, an alleged breach of Rules 5, 6 and 8 in relation to Allegation 3 above, and an alleged breach of Rules 6 and 9 in relation to Allegation 4 above.

The CRC considered whether the evidence before it disclosed any further potential breaches of the Rules of Conduct, or required further investigation. It concluded the evidence disclosed no further concerns, over and above those identified in the Allegations.

The CRC considered all the circumstances of the case including the checklist of items under Rule 9.3(b). In so doing it proceeded on the basis that all the matters disclosing a case to answer were proved to the requisite standard.

The CRC considered the breaches if proved could not be described as technical and trivial. They involved the doctoring of documents, misleading a client, and failing to preserve documents and files in line with stated policy. The CRC had considerable concerns about the limited insight the Respondents appear to have into the apparent failings in their practice, in particular seeking to defend their amendment of documents to materially alter the information contained therein.

Whilst the passage of time is always of crucial importance to an application for a patent, the CRC could identify no real or potential material prejudice or loss caused to the Complainant over and above that in any case where the efficiency of a Patent Attorney is found wanting.

On the basis of the evidence before it the CRC concluded there was clear and cogent evidence capable of amounting to a lack of integrity and thereby Rule 5. The Respondents had misled the Complainant in June 2018 and had persisted in so doing for a period of time up to August 2018. Had the Complainant not made his own application for an extension directly to the IPO it is unclear if he would ever have discovered the actual position. Arguably the conduct could be said to have gone further and could amount to dishonesty.

The CRC considered that the Respondents did not exercise sufficient care and conduct by failing to ensure continuity of service to the Complainant, and in failing to ensure the efficient prosecution of the Complainant's application. In addition, the lack of clarity in communications demonstrated a reckless attitude on behalf of the first Respondent such that he failed to ensure the Complainant had a full and unimpeded understanding of the situation.

The CRC did not consider the Respondents had demonstrated any understanding of the issues raised in the complaint sufficient to ensure the same thing could not occur again in the future. There was no evidence of any steps that had been taken to manage the future risk of further failings.

In the circumstances, the CRC concluded that if proved, the demonstrable lack of integrity raised by the facts as alleged would damage trust in the profession of Patent Attorneys and would thereby damage the profession as a whole.

The CRC noted that neither Respondent had any previous disciplinary history.

The CRC did not consider the case involved a matter of particular complexity nor did it raise public interest issues.

In the circumstances the CRC has therefore determined that in respect of those Allegations where it concludes there is a *prima facie* case, it is proportionate for the matter to progress further.

Summary Procedure

However, in so doing the CRC is mindful that this is the first complaint faced by either Respondent. Further, it relates to the conduct of both in relation to a single client, over a period of 5 months, during which time although there were manifest delays and potentially significant lapses in judgment and integrity, the rights and over-reaching interests of the client were not compromised.

Bearing in mind those factors the CRC is of the view that the gravity of the Allegations, if proved, is not so serious as to render its maximum powers of sanction insufficient.

The CRC has therefore determined that, pursuant to Disciplinary Rule 9.7 the case would be '*best dealt with*' through the summary procedure.

The CRC therefore invites the Respondents to confirm within 14 days of this determination whether they wish to elect a hearing before a Disciplinary Board, or whether they accept that the complaint may be dealt with through the summary procedure, without recourse to appeal.

Summary Procedure - Decision

The CRC, having determined that the case was suitable for the summary procedure, the Respondents were contacted to seek their confirmation as to whether they consented to the case being concluded via the summary procedure.

By email of 9 December 2019, the first Respondent confirmed he was content for the matter to proceed via the summary procedure. On behalf of the second Respondent and by email of the same date Mr. Lock confirmed the same.

The CRC noted the content of the communications from all parties. In so doing it noted that none of the responses save for Mr. Lock's on behalf of the second Respondent, sought to provide additional evidence or submissions as to the substantive findings made by the CRC on 3 December 2019.

The CRC noted the submission made by Mr. Lock on behalf of the second Respondent in his email of 9 December 2019. It noted that he gave further information as to the internal structure of the Second Respondent, sought to

challenge the inference the CRC had drawn as to the state of knowledge of those working for the second Respondent in relation to the deception at Allegation 3, and sought to mitigate the position regarding the transfer of papers at Allegation 4, by reference to '*accepted common practice*.'

The CRC considered that notwithstanding the submissions none of the further information it had received materially affected its factual findings.

The CRC therefore concluded that in respect of an alleged breach of Rule 6 of the Rules of Conduct as described in Allegation 1 above, an alleged breach of Rules 5, 6 and 8 of the Rules as described in Allegation 2 above, an alleged breach of Rules 5, 6 and 8 in relation to Allegation 3 above, and an alleged breach of Rules 6 and 9 in relation to Allegation 4 above, the Allegations were proved on the balance of probabilities.

Rule 9.9(c) - Sanction

It then moved to determine the necessary sanction.

In so doing, the CRC reminded itself that it was not primarily concerned with punishing the Respondents. Rather it was required to put at the forefront of its deliberations the public interest, namely the protection of the public, the maintenance of public confidence in the profession and the declaring and upholding of standards, and that it must impose the least sanction necessary to satisfy the public interest.

First Respondent

The CRC considered each Respondent in turn, starting with the first Respondent. It considered that the deception perpetrated by, or on behalf of, the first Respondent and thereafter perpetuated by him, was the most serious conduct complained of, and needed to be adequately reflected in the sanction it imposed. Further it considered the first Respondent's failure to ensure records were transferred to the new attorney, was a matter of concern and reflected a *laissez-faire* attitude to the interests of his client.

However, the CRC noted that the first Respondent had made attempts to expedite the application when he had returned to work, albeit without revealing the true position to his client.

The CRC further noted that the first Respondent had co-operated throughout the investigation and had shown a degree of contrition and remorse for his conduct. It noted that the complaints arose, in part, due to the first Respondent's ill-health at the time, and whilst not an excuse, did provide him with some mitigation for his actions and omissions. It also took into account his hitherto good record and lack of previous disciplinary history.

In considering the necessary sanction to impose the CRC noted the sanctions available pursuant to Rule 9.9(c) namely: a notice showing against

a Respondent's name in the Register for 6 months; a warning showing against a Respondent's name in the Register for a year; and a reprimand showing against a Respondent's name in the register for 3 years. In light of the lack of integrity it had found, and the nature of the deception facilitated by the first Respondent, the CRC concluded that a notice was insufficient to properly reflect the seriousness of his conduct.

The CRC next considered whether a Warning was sufficient. Taking into account all the evidence, and the aggravating and mitigating factors it had identified, the CRC determined that issuing a Warning was sufficient to satisfy the public interest in relation to the first Respondent. Such a warning would serve as a reminder to him that such behaviour was both a professional failure and a failure to put his client's interests foremost, and that it must not be repeated. Further, it would send a message to the profession that such behaviour was not tolerated with the profession of patent and trade mark attorneys and would serve as a declaration of the standards expected and required of a registrant of IPReg.

In all the circumstances the CRC has therefore determined to impose upon the first Respondent a Warning for a period of 1 year.

Second Respondent

The CRC considered that the facts as found proved demonstrated systemic failings in the second Respondent's management of the Complainant's case. It considered that the responses given on behalf of the second Respondent demonstrated a lack of any real insight into those failings. In particular the CRC noted that the second Respondent had carried out an internal investigation without accepting that it had done anything wrong.

The CRC further noted the recent email sent by Mr. Lock on behalf of the second Respondent, and his apparent rejection of the inference that the second Respondent ought to have known of the deception, subject of Allegation 3.

The CRC was troubled by the apparent lack of oversight exercised by the second Respondent over the work of the first Respondent and the apparent unwillingness of the second Respondent to accept any responsibility for that duty and consequently the failings identified.

The CRC was struck by the lack of any acknowledgement on the part of the second Respondent that the current management systems it exercises needed to be reviewed and made more robust in light of the findings the CRC has made.

Whilst the CRC was unimpressed by the level of insight the second Respondent had shown into its failings, it noted that the breaches identified did not in fact materially harm the Complainant, and that the work done, whilst slower than should have been the case, was done correctly, to the point

at which the Complainant terminated the relationship. It also noted that the second Respondent had co-operated with the investigation and had no previous disciplinary history.

In considering the necessary sanction to impose the CRC noted the sanctions available pursuant to Rule 9.9(c) namely: a notice showing against a Respondent's name in the Register for 6 months; a warning showing against a Respondent's name in the Register for a year; and a reprimand showing against a Respondent's name in the register for 3 years.

In light of the lack of insight and lack of control exercised by the second Respondent over its functions, coupled with the lack of integrity it had demonstrated, the CRC considered that a notice was insufficient to meet the needs in this case. Similarly, it considered a Warning was also insufficient.

The CRC considered whether a Reprimand was sufficient to protect the public interest. In light of the hitherto good record and lack of previous disciplinary history, the CRC concluded that a Reprimand was the necessary and proportionate sanction in this case. It adequately reflected the seriousness of the conduct in question and sent a clear message to the profession and the wider public, that such behaviour was not acceptable within the profession. It further served to declare and uphold standards within the profession as well as being a reminder to the second Respondent that such conduct must not be repeated in the future.

The CRC has therefore determined to impose a Reprimand upon the second Respondent for a period of 3 years.

Rule 9.9(a) - Recommended Action

Pursuant to Rule 9.9(a) the CRC recommends that both Respondents take the following remedial action in order to avoid a repetition of the breaches identified:

- a) Conduct a full and thorough audit and investigation of the second Respondent's procedures to identify how such breaches were allowed to occur;
- b) Based upon the results of the audit and investigation identify and implement changes to safeguard clients against similar breaches in the future;
- c) Issue a written apology to the Complainant.

The CRC reminds both Respondents that a failure to comply with a sanction imposed upon it may amount to a further breach of the Conduct Rules.

Costs

The CRC next turned to consider the question of costs. In so doing it noted the applications made by IPReg and the Complainant. It reminded itself of the principle that costs usually *follow the cause* and could see no reason in this case to deviate from that principle. Whilst it noted that two of the Allegations had failed in their entirety, it did not consider that this made any material difference to the costs incurred by either the Complainant or IPReg.

The CRC did note that IPReg had made a claim for the costs of the CRC members, which it felt might be affected by the contractual status of the Committee members. It has therefore sought further confirmation from IPReg as to the position and in particular whether such a claim is consistent with the Rules. If it is, the CRC determined that the appropriate figure for costs for its members was one of £1152 not £576 in order to reflect the accurate rate applicable to CRC members.

The CRC therefore makes the following order as to costs pursuant to Rule 9.9(d) that:

- i) The Respondents pay the Complainant's costs in the sum of £1675;**
- ii) The Respondents pay IPReg's costs up to a maximum of £5412;**
- iii) IPReg notify the Respondents within 14 days of receipt of this memorandum, of the finalised figure for its costs.**
- iv) The Respondents are jointly liable in costs for a total sum not exceeding £7087.**

Steve Gregory,
Chair of the Complaint Review Committee
31 January 2020