

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

**Memorandum of a meeting of the Complaint Review Committee of IPReg
held on 5 August 2021**

In the matter of

THE INTELLECTUAL PROPERTY REGULATION BOARD (Complainant)

and

ANTHONY BREEN (Respondent)

The meeting took place remotely via Zoom

Chair:

Alan Kershaw (Lay member and chair)

Members:

Caroline Seddon (Lay member)

Samantha Funnell (Professional member)

Legal Advisor:

Tim Grey

Background

1. Dr. Breen, the Respondent, was admitted to the register of Patent Attorneys on 20 June 2007. He holds the IP Litigation Skills Certificate.
2. The respondent is in the Sole Trader fee paying category. He does not work through a registered firm.
3. In March 2019, IPReg became aware that the respondent had failed to renew his certificate of professional indemnity insurance (“PII”) with PAMIA for the policy year July 2018 – June 2019. The respondent advised that he had failed to renew his PII policy in 2018 as he was aware he needed to disclose a client complaint to PAMIA and he was unsure how to present this on his renewal documentation. In addition, the respondent indicated that he was unsure whether to extend his cover from £250,000 to £500,000. The respondent stated that in hesitating to complete the documentation he then forgot to do so, the policy lapsed and when he realised, he sought to take out another policy with PAMIA who declined to offer insurance.

4. When the respondent had been unable to obtain PII either with PAMIA or another participating provider, his registration was suspended by the Registrar, pursuant to Regulation 7.4(c) of the Qualification and Registration Regulations 2009. The respondent was notified of his suspension on 17 April 2019 and he subsequently appealed that decision.
5. During the course of the appeal process, the respondent advised that he had obtained compliant PII from 26 June 2019 with another provider, China Re. The respondent's suspension was therefore lifted and the matter was kept under review whilst compliance was monitored.
6. On 25 June 2020, the respondent's PII cover with China Re expired. This was because China Re declined to sign IPReg's Minimum Terms & Conditions for the 2020 financial year and at the date of the expiry of the policy, the respondent was unable to renew PII cover with China Re.
7. On 31 January 2021, the respondent completed and submitted his Annual Return for the 2021 practice year. As a sole trader, he was required to provide evidence of his compliant PII in accordance with Rule 17 of the Rules of Conduct. The respondent wrote to IPReg explaining that he had been unable to obtain PII cover and that in consequence he had temporarily stopped holding himself out as a UK patent attorney, and instead had been presenting himself as a European patent attorney, whilst not removing himself from the IPReg register.
8. In the meantime the Respondent had sought to obtain PII cover and had failed to do so. He had therefore made clear to clients the extent of cover he offered personally and that he was not insured.
9. On 31 January 2021 the Respondent applied for PII with PAMIA. At the time of writing that application was pending and the Respondent sought further information from IPReg as to other insurers in the market.
10. IPReg wrote to the respondent on 24 February 2021 to advise that he needed to provide evidence of his compliant PII by 3 March 2021 or his name would be suspended from the register.
11. The respondent replied to IPReg on 4 March 2021, advising that he was struggling to obtain PII and asking that IPReg not suspend his registration immediately and that IPReg provide him with the names of other insurers used by patent attorneys that were not listed on IPReg's website.
12. The Registrar considered the respondent's request but decided it was appropriate to suspend his registration with immediate effect given the respondent's history of failing to maintain PII and continuing to practise without insurance. IPReg confirmed that there was no 'other list' of insurers and that those that were listed on IPReg's website and in the Rules of Conduct, were the only approved insurance providers.

13. The respondent's name was therefore suspended from the register on 4 March 2021 and he was advised the matter would be referred to the Complaint Review Committee (CRC) under the Disciplinary Procedure Rules. He was given 28 days to file brief and concise observations on the allegation made against him.
14. The respondent replied by email and letter on 2 April 2021. In it, he made three requests in respect of which he requested a response:
 - a. That IPReg not refer the matter to the CRC because the issue was that he was unable to obtain PII due to the hardening of the PII market generally.
 - b. That IPReg proactively go out to the PII market to attract new PII providers to sign up to its Minimum Terms & Conditions.
 - c. That IPReg disapply Rule 17 of the Rules of Conduct due to a conflict with its rules and those of the EPI in relation to European Patent Attorneys.
15. It is unnecessary to set out the full extent of the correspondence thereafter that passed between IPReg and the Respondent. Suffice it to say the Respondent asserted that IPReg was in breach of numerous duties it owed to those it regulated, to its regulatory objectives and to the public. He further asserted that IPReg's position was anti-competitive. That correspondence culminated in his letter of 24-25 May 2021 in which the Respondent re-iterated and augmented his assertions that the matter ought not to be referred to the CRC, that the Regulatory Objectives were undermined by such an approach and that the CRC should not take any disciplinary action against him.
16. In spite of those assertions IPReg's position remained that the matter should be considered by a CRC.

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

17. The Complaint Review Committee ("CRC") considered the admissibility of the complaint in accordance with Rules 8.2 and 8.3.
18. The CRC concluded that having regard to Rules 8.3(a) (i) and (ii), the complaint was in time, having been made by IPReg and that the subject matter of the complaint fell within IPReg's jurisdiction as it raised issues as to the professional conduct of the Respondent, who was a registered patent attorney.
19. 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

20. The CRC considered the meaning of a “prima facie case” in Rule 9.2(a) of the Disciplinary Procedure Rules (“the Rules”) 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?”

Allegation

“It is alleged that you, Dr Anthony Breen, at all times being a Patent Attorney registered with the Intellectual Property Regulation Board, in breach of Rule 17 of the IPReg Rules of Conduct, failed to maintain a policy of professional indemnity insurance with a participating insurer:

- (1) Between 1 July 2018 and 26 June 2019; and
(2) From 25 June 2020.”*

21. The CRC noted that the evidence before it demonstrated the Respondent failed to have PII as alleged in (1) and further failed to have PII as alleged in (2) to date. It noted the Respondent accepted he did not have PII in place during those periods and that his correspondence with IPReg had been largely explanatory and sought to justify why he did not have PII, rather than seeking to challenge the Allegation. The CRC therefore concluded there was sufficient evidence to satisfy the evidential test, such that there was a *prima facie* case.

Rule 9.2(b) & 9.3 – Proportionality

22. In assessing the question of proportionality the CRC took account of the considerations set out at Rule 9.3 insofar as they applied to this matter. In particular, the CRC noted that the alleged breach was not merely technical in nature, had subsisted for a protracted period of time and gave rise to serious potential risks to clients and to the reputation of the profession. As such, it concluded that it would not be disproportionate to progress the complaint further.
23. In so deciding the CRC had regard to the difficulties the Respondent had in obtaining PII in the current market. Whilst the CRC had some sympathy with those difficulties, they did not absolve the Respondent of his duty to have PII. Nor could the market difficulties account for how and why he had allowed his PII to lapse in the first place.

Summary Procedure

24. The CRC next considered whether the complaint was suitable for summary disposal, in accordance with Rule 9.5.

25. In determining whether the complaint was suitable for summary disposal, the CRC took account of the following aggravating features of the complaint:

- The Respondent was repeatedly reminded by PAMIA about his renewal in the period before it lapsed and provided no credible explanation why he did not renew.
- The period of time over which the Respondent was without PII was lengthy and spread over two distinct periods.
- The Respondent had failed to report a complaint to his insurers at the time he had been due to renew his insurance.
- The Respondent continued to practice without PII, in contravention of Rule 17 of the Rules of Conduct for Patent Attorneys, Trade Mark Attorneys and Other Regulated Persons.
- The Respondent sought to limit his liability with clients in doing so, seemingly regardless both of the fact that this was insufficient to indemnify clients and of the risk he put clients at in seeking to do so.
- The Respondent had demonstrated a significant lack of insight into the need for and the importance of PII to clients and to the reputation of the profession.
- The Respondent sought to minimise his own failings and focus on the perceived injustice he felt by reason of the PII market for those practising as patent and trade mark attorneys.
- The Respondent had failed to inform IPReg that he had ceased to have PII.

26. In addition, the CRC took account of the following mitigating features:

- The Respondent had fully cooperated with IPReg's investigation.
- The Respondent admitted the allegation.
- Although the Respondent had failed in a profound requirement of registration his behaviour had not in fact resulted in harm to a client.
- The Respondent had attempted to limit the possible harm to clients by working only as an EP attorney, although in order to properly comply with his regulatory obligations he should have informed IPReg and sought voluntary removal from IPReg's register.
- The Respondent had not been subject to any previous complaints.
- The complaint did not arise out of his professional work.

Determination on Applicability of Summary Disposal

27. Having carefully considered the aggravating and mitigating factors, the CRC was of the view that the gravity of the Allegation, if proved, was not so serious as to render its maximum powers of sanction insufficient.

28. The CRC therefore determined that, pursuant to Disciplinary Rule 9.7 the case would be '*best dealt with*' through the summary procedure. In consequence the CRC invited the Respondent to consent to the summary

procedure and to provide any further information he wished the CRC to take into account when determining “*whether to uphold the complaint and/or in mitigation of any penalty if the Complaint was upheld.*”

Further Information Provided by the Respondent

29. Pursuant to its invitation, the CRC received an email from the Respondent dated 22 June 2021. Within it the Respondent acceded to summary disposal and provided additional comments in furtherance of his frustrations around obtaining PII cover from a provider other than PAMIA.
30. He also provided demonstrable evidence of insight and remorse: “*I realise now I should have proactively come to IPReg in the 2nd half of 2020 to declare that CRC had exited the insurance market, rather than waiting to declare it on my 31 Jan annual declaration to IPReg. If I face the same situation in the future, I would proactively go to IPReg...*”
31. The CRC also received two further emails and a letter from the Respondent dated 4 August 2021 relating to IPReg’s application for costs. Within it the Respondent opposed the costs application as costs were unjustified where IPReg had chosen to initiate CRC proceedings; in pursuing the matter IPReg was acting contrary to its Regulatory objectives; the whole affair was as a result of insurance companies refusing PII; and the Respondent was unable to satisfy any costs order given his financial circumstances.

Determination of Summary Procedure

32. Whilst the CRC considered whether the complaint should be upheld, it had little difficulty in confirming it should, given the full admissions made by the Respondent to the Allegation previously.
33. In determining the necessary sanction to impose, the CRC took careful account of its powers pursuant to Rule 9.9 (a) - (c):

If the Respondent does not elect for the matter to be referred to a Disciplinary Board, the CRC shall, after considering any additional information submitted by the Respondent, determine whether the Complaint is made out and, if it is:

- a) issue a public notice, warning or reprimand to the Respondent stating the facts of the matter, the nature of the Respondent’s breach and if appropriate a recommendation as to any actions to be taken by the Respondent to avoid a repetition of the breach;*
- b) send copies of the issued notice, warning or reprimand to the Respondent and the Complainant;*
- c) inform the Registrar that a notice, warning or reprimand has been issued and require that this be noted against the entry, in the Patent Attorney Register and/or the Trade Mark Attorney Register, of the Respondent and/or of any Registered Person of whom the Respondent is an employee or manager (as applicable), for a period of:*

- i) 6 months in the case of a notice;*
 - ii) 1 year in the case of a warning; and*
 - iii) 3 years in the case of a reprimand;...*
34. The CRC gave careful consideration to the aggravating and mitigating features it had previously found present, and considered all still remained. It took careful account of the further information provided by the Respondent in the interim, and whilst it considered the information to be of assistance it did not add anything wholly novel to the evidence before it.
35. The CRC noted that within the new material provided by the Respondent he had expressed contrition for his previous behaviour and had begun to develop better insight into the effect of his behaviour on the profession, his clients and the public at large. The process of developing insight was, the CRC concluded, far from complete but had at least begun.
36. The CRC first considered whether a notice might be sufficient and considered it did not afford a long enough period of time for reflection. Nor did it sufficiently mark the seriousness of the conduct identified in this case.
37. In all the circumstances the CRC concluded that it was necessary and proportionate to impose the sanction of a Warning. In so doing the CRC considered that the length of time a Warning would remain on the register was sufficient for the Respondent to develop full insight into his failings. It was also the least restrictive sanction necessary in the circumstances of this case to mark the seriousness of the failings the CRC had identified.

Costs

38. In assessing costs the CRC considered the application made by IPReg for a sum in the amount of at least £1605.60.
39. The CRC considered that as a matter of principle the Respondent should pay the costs of proceedings brought about by his own identified failings.
40. It noted the Respondent's submissions on costs. It considered his submission regarding IPReg's decision to bring proceedings to be without merit. IPReg was required to fulfil its regulatory functions and protect the public and the profession where practitioners failed to abide by the fundamental obligations of registration, such as having extant PII cover.
41. The CRC was cognisant of the extremely difficult conditions experienced by many in the profession in light of the Covid-19 pandemic. It noted, in particular the financial difficulties the Respondent submitted he was experiencing and, noted his apparently limited ability to satisfy any costs order. Whilst accepting this to be the case the CRC was provided with no evidence of the Respondent's financial position by way, for example, of

bank statements or bills. It could therefore only arrive at an approximate reduced figure for costs based upon the limited information available.

42. Given the Respondent's circumstances described within his correspondence, the CRC invites the Registrar and Respondent to give anxious consideration to finding a pragmatic payment plan that enables the Respondent to meet the costs as expeditiously as possible, but without undue financial hardship being occasioned to him or his business.
43. The CRC has therefore determined to impose a Warning and make an award of a contribution to IPReg's costs in the sum of £900.

Signed:

Alan Kershaw
Chair of the Complaint Review Committee.
5 August 2021