

**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

CHRISTOPHER BROTHERS (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. Mr. Brothers, the respondent, was admitted to the register of Patent Attorneys on 21 August 2008. 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 May 2019, IPReg became aware that the respondent had not provided evidence that he had compliant professional indemnity insurance (PII) in place pursuant to Rule 17 of the Rules of Conduct. Correspondence was exchanged with the respondent who indicated that he was seeking to secure compliant PII which had lapsed following a period of ill health.
4. IPReg continued to liaise with the respondent to seek to support him in coming into compliance with Rule 17. However, the respondent was unable to obtain PII and accordingly his registration was suspended on 5 November 2019.

5. On 11 March 2020, IPReg wrote to the respondent again to ask for an update on his PII position, noting that he had not renewed his registration for the 2020 practice year. He was asked to indicate whether or not he intended to continue practising.
6. The respondent replied the same day, stating that he had been “very harshly treated by PAMIA” and that his broker had been unable to find another provider despite best efforts. He asked IPReg to provide the names of contacts with qualifying insurers who might be able to assist him.
7. IPReg responded the following day confirming that it did not have the names of any direct contacts within the provider organisations, and asking him to confirm the circumstances in which PAMIA declined to offer further cover. The respondent was also asked to provide copies of correspondence in relation to his attempts to secure cover on the open market. No immediate response was received.
8. On 12 March 2020, IPReg asked PAMIA to provide information about its decision to refuse to renew the respondent’s PII cover and the relevant correspondence. PAMIA advised that due to the pandemic and its staff working from home, it did not have access to its archived files to provide the information requested but did confirm that the respondent’s policy lapsed due to a failure to renew.
9. On 21 May 2020, the respondent received a systems-generated email from IPReg advising that as he had not renewed his registration for the 2020 practice year, his name would be removed from the register on 1 June 2020. In response to that email, the respondent confirmed that he was still in the process of trying to secure PII and that as IPReg did not have the names of contacts for the non-PAMIA insurance providers, its list was not up to date and he could not secure PII as required. He advised that this was a very distressing time for him, exacerbated by the pandemic and his inability to secure PII was as a result of a severe lack of approved insurance providers.
10. IPReg responded the same day with further advice and asking for copies of correspondence he had with his broker in relation to attempts to secure PII. The respondent emailed the same day forwarding an email chain with his broker which set out the attempts to secure PII between May 2019 and April 2020. There followed some correspondence between IPReg and the respondent about additional providers joining IPReg’s participating insurers scheme and the requirement that they sign up to the Minimum Terms & Conditions.
11. On 2 March 2021, IPReg contacted the respondent again having noted that the respondent appeared to be actively practising and that he had not updated IPReg with evidence of compliant PII. He was advised that the matter would be referred to the Complaint Review Committee. He was

asked questions about the nature of his practice during the period in which he was not insured.

12. The respondent replied by emailed letter on 30 March 2021 advising that he had referred the matter onto the Competition and Markets Authority (“CMA”) on the advice of an MP because of the market monopoly held by PAMIA who refused him cover “without any explanation”. He said he was suffering from [REDACTED] exacerbated by the pandemic and asked that the matter be deferred until the CMA had reached a conclusion on his complaint.
13. IPReg responded on 13 April 2021 and suggested he may wish to [REDACTED] IPReg nonetheless advised that as the CMA had not indicated at that stage that it would look into the respondent’s concern about the alleged anti-competition situation, the matter would proceed. IPReg asked for some clarification information arising out of the respondent’s 30 March letter and he was asked to do so within 7 days.
14. On 20 April the respondent emailed IPReg to advise that despite his explanation of his failure to renew his PII policy, PAMIA refused cover without providing reasons. He said that his numerous attempts to get alternative cover had failed and that his predicament was due to PAMIA’s monopoly position in the market.
15. The respondent also provided additional information about his [REDACTED] health between 2018 and 2020, [REDACTED] which contributed to his [REDACTED].
16. IPReg approached PAMIA again on 30 April 2021 to ask whether they now had access to its archived file so that the evidence in relation to the respondent’s failure to renew his PAMIA policy could be considered. The archived file was provided on 10 May 2021 and shows that the respondent’s file was lapsed as at 30 June 2018 following his failure to renew his insurance.

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?”
21. The CRC then turned to consider the material before it, and in particular the Allegation framed by IPReg:

Allegation

“It is alleged that you, Christopher Brothers, 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 from 1 July 2019.”

22. The CRC noted that the evidence before it demonstrated the Respondent failed to have PII as alleged from 1 July 2019 to date. It noted the Respondent accepted he did not have PII in place during that period 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

23. 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.
24. 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

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

26. 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 failed to correspond with PAMIA to explain why he was unable/unwilling to renew.
- The period of time over which the Respondent was without PII was lengthy.
- 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 had sought to justify his failings by reference to the current market for PII, rather than engaging with and developing insight into the effect of a lack of PII on clients and the wider public interest.

27. 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 not been subject to any previous complaints.
- The Respondent was suffering with some form of ill-health at or around the time his renewal was due.
- The complaint did not arise out of his professional work.

Determination on Applicability of Summary Disposal

28. 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.

29. 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

30. Pursuant to its invitation, the CRC received an email from the Respondent dated 23 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.

31. He also provided some limited information in relation to his physical health.
32. The CRC also received a further email from the Respondent dated 5 August 2021 relating to IPReg's application for costs. Within it the Respondent submitted that the costs application was "*incredible*" given the current circumstances associated with the Covid-19 pandemic. He further indicated he had not been warned of an award of costs previously.

Determination of Summary Procedure

33. Whilst the CRC considered whether the complaint should be upheld, it had little difficulty in confirming it should give the full admissions made by the Respondent to the Allegation previously.
34. 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;...

35. It 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.
36. The CRC noted that, within the new material provided, the Respondent had expressed some contrition for his previous behaviour and had begun to develop some 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. The CRC also noted the health issues the Respondent had raised and took those into account in his favour.

37. 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.
38. In all the circumstances the CRC concluded that it was necessary and proportionate to impose a 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 Respondent to develop proper 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

39. In assessing costs the CRC considered the application made by IPReg for a sum in the amount of at least £1,605.60.
40. The CRC considered that as a matter of principle the Respondent should pay the costs of proceedings brought about by his own identified failings.
41. It noted the Respondent's submissions on costs and that he had not been made explicitly aware of the costs regime. However, the CRC considered it was incumbent upon all regulated individuals to be familiar with the Rules and Regulations of their Regulatory body, particularly in circumstances where their conduct was subject to proceedings.
42. The CRC was cognisant of the extremely difficult conditions experienced by many in the profession in light of the Covid-19 pandemic and in the circumstances determined to make an order for costs in the sum of £1,200.
43. Given the current circumstances described above, 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.

Signed:

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