

In the matter of

The Constitution of the Institute of Financial Advisers Inc.
and its By-laws

and

In the matter of
Committee

Charges referred for hearing by the Disciplinary

Between:

The Institute of Financial Advisers Inc.

and:

“Member A”, a Member

Determination of the Disciplinary Committee as to costs
(Dated 28 August 2009)

Disciplinary Committee
Anthony N Frankham (chairman)
Robert Narev
Karl Schweder

Determination of the Disciplinary Committee as to costs

Background

[1] The Disciplinary Committee (referred to in this decision as “the Committee”) heard charges against “Member A” (referred to as “Member A”, or “the Member”) at a hearing on 8 July 2009. After considering the evidence and submissions, the Committee dismissed the charges in an oral decision given at the hearing. In a reasoned written decision dated 16 July 2009 that followed, the Committee gave the parties 14 days to confer on the question of costs. They had leave to come back to the Committee for a determination if they could not reach agreement.

[2] On 10 August 2009 counsel for the Institute of Financial Advisers (referred to as “the IFA” or “the Institute”) advised that the parties had not reached agreement and filed a memorandum setting out the submissions for the Institute on the question of costs. The chairman of the Committee conferred with counsel for both parties and set a timetable for submissions to be filed for the Member and for submissions in reply for the Institute. The Committee received all submissions in accordance with the timetable and the Committee initially met to consider the submissions on 17 August 2009.

[3] Following receipt and initial review of submissions, the Committee drew the attention of counsel attention to case law that appeared to be relevant to the issues at large but not referred to in submissions. We invited further submissions on the weight the Committee might give to that legal precedent.

Determination of the Disciplinary Committee

[4] For the reasons we explain later in this determination, based on the authority contained in case law, there will be no order for costs against the Institute of Financial Advisers despite the Committee’s dismissal of both the charges made against Member A. Accordingly, we dismiss the application for an order for costs made on the member’s behalf.

[5] The Disciplinary Committee orders that the Institute shall publish this decision in a manner approved by the chairman of the Committee in a way that does not identify the Member, the complainant, or their locations.

Initial submissions for the Institute

[6] In his submissions for the Institute on costs, Mr Holloway submitted that the Committee does not have jurisdiction to award costs against the Institute. His submissions followed a reasoned argument ending in a conclusion that submitted:

- No jurisdiction exists for awarding costs against the IFA.
- Based on the information provided by Member A at the time, the Complaints Committee acted reasonably by referring the complaint to the Disciplinary Committee.
- Even if a jurisdiction to award costs exists (which is denied), the IFA should not be penalised for acting reasonably in response to a clear prima facie case. An adverse costs award in such circumstances will undermine the IFA's function and purpose.
- Costs should lie where they fall.

Initial submissions for the Member

[7] For Member A, Miss Quinn's submissions included the following:

- It is accepted the relationship between the IFA and its members is contractual.
- Even if there is no express provision contained within the Disciplinary Bylaws to award costs to a member found not guilty by the Committee of charges laid by the IFA, nevertheless the principles of natural justice will apply and allow costs to be awarded.
- The overriding objective of any hearing procedure by the IFA is that the principles of natural justice prevail.
- The applicable principles of natural justice will not be the same in every case. However, in respect of a disciplinary process that can result in harsh sanctions it would be expected that the IFA would have properly considered whether the charges as laid could be proved against Member A.
- It is accepted that one of the goals of the IFA should be to uphold and promote professional standards. One of the ways of achieving this is to ensure compliance with the Code of Ethics. In order to do this, and to gain and retain the confidence of its members, the IFA must ensure that its disciplinary process complies with the rules of natural justice. Members have the right to expect that charges which carry the possibility of serious sanctions are only laid following a robust investigation, which follows a clear process and is fair to the member.
- Charges should only be laid where the IFA has ensured that there is a good prima facie case on all elements of the charge.
- Where the IFA is relying on a civil standard for the burden of proof but the consequences of a finding that the charges are proved are very serious, extra caution should be exercised before charges are laid.

- In deciding to continue to prosecute the charges without sufficient cause, the IFA breached the principles of natural justice.
- There is no objection to the submission that members who have done no wrong should not be required to contribute to costs through the payment of higher membership fees. It should be remembered that Member A, is also a member who has done no wrong in relation to the charges at issue. It is equally unfair that she should be penalised. The IFA's attitude appears to be that a member is guilty of misconduct unless the member proves otherwise. It is this attitude that is likely to undermine the members' trust and confidence in the IFA, not the awarding of costs against it.
- It is accepted that there may be cases where a prosecution is not black and white. This was not one of those cases because there was no evidence to support a finding that Member A had actually misled or deceived the complainant or failed to carry out reasonable research.

[8] Miss Quinn did not refer to any case law in support of her contentions. She sought an order for costs in “Member A’s favour and against the IFA for \$17,999.16.

[9]] In submissions in reply Mr Holloway asserted:

- The IFA's investigation was conducted properly and reasonably. There is no allegation that the IFA's complaints process was not followed correctly. The complainant’s complaint was fully investigated by the Compliance Manager and the Complaints Committee. This included putting the letter of complaint to Member A and seeking her response. The Complaints Committee decided that charges should be made only at the conclusion of this process, and after determining that, on the evidence available at the time, the complaint was justified.
- The IFA acted in good faith in bringing and continuing these proceedings and there is no evidence whatsoever of any bad faith.
- Based on the Complaints Committee decision, the IFA was right to conclude that it did have sufficient evidence to support the charges against Member A in the absence of any contrary evidence. It was “Member A’s” additional and new evidence at the hearing that led to a conclusion that, on the balance of probabilities, the charges could not be proved.
- The IFA's position remains that no jurisdiction exists to award costs against it.

Relevant case law

[10] The Committee identified the English Court of Appeal decision in Baxendale-Walker v Law Society [2007] All ER 330 as being relevant to this proceeding. That case relates to a claim for costs by a member of a professional body (a solicitor) against the professional body (the Law Society) when charges against him were in part dismissed. In that case, it was held:

“When the Law Society was discharging its responsibility as a regulator of the profession, an order for costs should not ordinarily be made against it on the basis that costs follow the event. There was no assumption that an order for costs in favour of a solicitor who had successfully defeated an allegation of professional misconduct would automatically follow. Where the Law Society was addressing the question whether to investigate possible professional misconduct, or whether there was sufficient evidence to justify a formal complaint to the tribunal, the ambit of its responsibility was far greater than it would be for a litigant deciding whether to bring civil proceedings. Disciplinary proceedings supervised the proper discharge by solicitors of their professional obligations, and guarded the public interest by ensuring that high professional standards were maintained, and where necessary, vindicated. Although the Law Society was not obliged to bring disciplinary proceedings, if it was to perform its functions and safeguard standards, the tribunal was dependent on the Law Society to bring properly justified complaints of professional conduct to its attention. Accordingly, the Law Society had an independent obligation of its own to ensure the tribunal was enabled to fulfil its statutory responsibilities.

The exercise of that regulatory function placed the Law Society in a wholly different position of that of a party to ordinary civil litigation. The normal approach to costs decisions in such litigation has no direct application to disciplinary proceedings against a solicitor. The tribunal’s costs decision should be informed by the crucial feature that the proceedings had been brought by the Law Society in its exercise of its regulatory responsibility in the public interest and in the maintenance of proper professional standards. For the Law Society to be exposed to the risk of an adverse costs order simply because properly brought proceedings had been unsuccessful might have a chilling effect on the exercise of its statutory obligations to the public’s disadvantage. Accordingly, the appeal would be dismissed.”

[11] As neither party referred to this decision in submission, the Committee gave counsel the opportunity to submit on the relevance of the UK decision. We received these submissions on 21 August 2009.

Further submission for the IFA

[12] Mr Holloway submitted that Counsel's research had revealed no specific adoption of Baxendale-Walker by the New Zealand Courts. Nor has any contradictory precedent come to counsel's attention. In the absence of any contradictory New Zealand precedent, Baxendale-Walker is both a persuasive and authoritative decision and should be followed.

Further submission for the Member

[13] In submissions the Committee invited on relevant case law Ms Quinn asserted that:

- This decision is not authority for the proposition that for costs to be awarded against a disciplinary body there must be a finding that the disciplinary body proceeded on the basis of bad faith or dishonestly.

- The Court referred to the three principles relied upon by Lord Bingham CJ in the City of Bradford case¹. Those propositions are:

- (a) The statute confers a discretion on the court to award costs as it thinks just and reasonable.
- (b) What is just and reasonable depends on the relevant facts and circumstances.
- (c) Where a complainant has successfully challenged the decision of the regulatory body acting honestly, reasonably and on grounds that generally appear to be sound, the court should consider in relation to other facts and circumstances both (i) the financial prejudice to the particular complainant in the particular circumstances if an order for costs is not made in his favour; (ii) the need to encourage public authorities to make and stand by honest, reasonable and apparently sound administrative decision made in the public interest without fear of exposure to undue financial prejudice if the decision is successfully challenged.

The Court also referred to the decision of R (on the application of Gorlov) v Institute of Chartered Accountants in England and Wales². That decision found that costs do not necessarily follow the event but success against the disciplinary body is a factor in favour of costs but it is not decisive. Mr Gorlov was awarded costs on the basis that the Institute's conduct in the whole process was unreasonable even though its conduct throughout the disciplinary proceeding was honest and well intentioned.

- Further, in the Baxendale-Walker case serious misconduct by the solicitor was established.
- The Baxendale-Walker case differs from the situation here because there is an express statutory provision, which provides that costs orders, may be made against any party. This case deals with how the principles as to how the discretion may be exercised. The rights and powers of the IFA are derived from contract; it is submitted that unless there is an express exclusion in

¹ *City of Bradford Metropolitan DC v Booth* [2000] COD 338

² *R (on the application of Gorlov) v Institute of Chartered Accountants in England and Wales* [2001] ACD 393

the Bylaws in relation to payment of costs to a Member under the disciplinary procedure the principles of natural justice must be applied.

[14] Miss Quinn claimed that the submissions on behalf of Member A also relied on the decision of the Committee at the hearing to award costs in this case, notwithstanding the IFA's oral submission that costs could not be ordered against it. She said Member A was entitled to conclude that the Committee believed that the particular circumstances of this case justified a finding that the IFA should pay costs to Member A.

[15] Miss Quinn also said the IFA's position, that there is no jurisdiction to award costs against it at all, has not changed since the date of hearing and Member A has been put to further costs in making submissions in support of costs. Counsel submitted that in the circumstances it would not be unreasonable to order that IFA is required to make a 50% contribution to Member A's costs.

The jurisdiction issue

[16] On their face, the circumstances of this case suggest that it could be appropriate for some reimbursement by the prosecuting IFA of some of the significant costs incurred by the member. The member was the subject of two charges of significance and was required to instruct lawyers and attend at a formal hearing. In the event, we found the Member not guilty of the first of the two charges laid because although we found some of the particulars pleaded were true, we found they did not lead to a guilty finding on the charge. We found the prosecution did not prove the second charge evidentially.

[17] We saw some merit in the natural justice argument presented by Ms Quinn in that we did not see that the failure of the Institute's Constitution to mandate us to make an order for costs against the Institute should necessarily outweigh natural justice considerations. We were also concerned that the process appears to have put the Member in the position of having to disprove the particulars and the charges against her rather than require the prosecution prove them. It was significant that Ms Quinn presented no case law in support of her proposition that the common law requirement to observe the rules of natural justice override the provisions of the contractual relationship between IFA and its members. Neither, we think, did counsel for the Member successfully dispose of the compelling authority in Baxendale-Walker.

[18] We cannot distinguish the facts in the present case as being so different from those in the decision in Baxendale-Walker to render the precedent untenable. The major difference we apprehend is that in Baxendale-Walker the authority for the regulatory body was statutory

whereas the IFA's authority is contractual. We think that does not change the position. The responsibilities of the governing bodies are sufficiently similar.

[19] Addressing the specific submissions of Miss Quinn on the authority of Baxendale-Walker in the circumstances of this case we note as follows:

(a) *The propositions in the City of Bradford case.* We have considered these propositions and find (a) and (b) in paragraph 13 above have been met. We address (c) under the next two headings.

(b) *Financial prejudice to the Member.* We do not see how financial prejudice to the Member can be an issue that reverses the principle in the circumstances of this case.

(c) *Obligation of the regulatory body to take a sound administrative decision.* This obligation applies equally to the IFA and that is what the process sought to do.

(d) *The Gorlov case – unreasonable conduct by the Institute.* In the present case there is no assertion or evidence that indicates unreasonable conduct by the Institute such that the principles in Baxendale-Walker should not apply.

(e) *Unbefitting conduct by the solicitor was established in Baxendale-Walker.* This issue is not relevant. The principle addressed whether an order for costs in favour of a solicitor who had successfully defeated an allegation of professional misconduct would automatically follow.

(f) *No express authority to the IFA.* As we have noted, we think the statutory/contract differences do not change the position. It is clear that the IFA Constitution does not award the right to the Committee to order costs against the Institute. For us to be able to do so would require the rules of natural justice to imply such a right. We were not given any authority for that proposition.

None of these issues carries weight to reverse the principles enunciated in the authoritative case law.

[20] There were some elements about the processes followed by the Complaints Committee, with which we disagree (including the offering of a negotiated settlement to the member after taking a decision that the member's conduct was of sufficient gravity to refer charges to the

Disciplinary Committee). However, on the evidence we consider the Institute, through its Complaints Committee, met the tests in Baxendale-Walker viz:

- *Was there sufficient evidence (available to the Complaints Committee) to justify a formal complaint to the tribunal?*
- *Have the proceedings been brought by the [IFA] in its exercise of its regulatory responsibility in the public interest and in the maintenance of proper professional standards?*

and there is no evidence to require us to find that the Institute acted improperly.

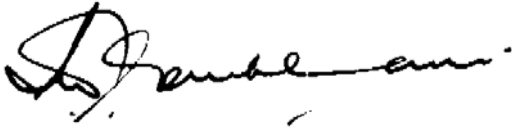
[21] We reject the argument for the Member that, “because Member A relied on the decision of the Committee at the hearing to award costs in this case, notwithstanding the IFA's oral submission that costs could not be ordered against it, Member A was entitled to conclude that the Committee believed that the particular circumstances of this case justified a finding that the IFA should pay costs to Member A”. The Committee made no such decision at the hearing or in the written determination that ensued. Following the oral presentation of the Committee's decision to dismiss the charges, the chairman invited submissions on costs. In an oral submission, Mr Holloway asserted that the Committee did not have jurisdiction to award costs against the Institute. The chairman said he wondered whether the rules of natural justice might have some application. Miss Quinn claimed the application of natural justice but presented no legal argument. Neither counsel presented legal argument nor did the Committee give a decision on costs other than the opportunity for the parties to confer and to file memoranda in the event they could not agree.

Conclusion

[22] We make the finding that the decision in Baxendale-Walker is both persuasive and authoritative. The authority and reasoning of the identified case law on the point of law concerning the Committee's authority to make an order for costs against the Institute, as a professional body responsible for regulation of the affairs of its members in the public interest, determine our position. We find that, in the circumstances of this case, the implied application of the common law rules of natural justice do not override the contractual relationship between the Institute and its members and the authority of the case law, must prevail. In this case, costs should lie where they fall.

[23] Having come to this conclusion we do not need to consider further the claim for costs or their detail.

By Order of the Disciplinary Committee

A handwritten signature in black ink, appearing to read 'A N Frankham', with a stylized flourish at the end.

A N Frankham
Chairman
28 August 2009

Legal representation:
For the Institute Phillips Fox (Adam Holloway)
For the Member Kelly Quinn – Barrister