

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

In the matter of Charges referred for hearing by the Disciplinary Tribunal

Between: The Institute of Financial Advisers Inc.

and: "B", a Member

Determination of the Disciplinary Tribunal
(Dated 10 November 2009)

Disciplinary Tribunal:
Anthony N Frankham (Chairman)
Robert Narev
Karl Schweder

Determination of the Disciplinary Tribunal

- [1] Mr B, (“the Member”), a member of the Institute of Financial Advisers (“the Institute” or “IFA”), was the subject of a complaint to the Institute dated 27 October 2008. Following investigation by the Professional Conduct Committee of the Institute that committee decided to prefer two charges against him and to refer those charges to the Disciplinary Tribunal (“the Tribunal”) for hearing and determination.
- [2] Between the time of their issue and the hearing date the parties sought leave to amend the second charge. During the course of the hearing and following legal argument, the parties jointly made application to have the second charge withdrawn. The Tribunal consented to both the changes and the withdrawal.

The charges

- [3] The charges against the member and the associated particulars that remained were:

The first charge:

“Rule 4 – Personal Professional Conduct

That you, Mr B, being a member of the Institute and acting in your professional capacity, did breach By-law 4.1 of the Code of Ethics and Professional Conduct in force during the relevant time by acting in a way that:

- 1.1 did not reflect credit upon the financial services profession and on the Institute; and/or*
- 1.2 might bring the reputation of the financial services profession into question.*

RULE 4

Members shall adhere to this Code of Ethics and Professional Conduct and the Institute’s Bylaws, and comply with and understand relevant law and do nothing to bring the Institute or the financial services profession into disrepute.

BYLAW 4.1

4.1 A member’s conduct in all matters is to reflect credit upon the profession and the Institute.

Actions that might bring the reputation of the financial services profession into question are to be avoided.

Particulars:

1.2.1 *In or about July 2007 you personally assisted the complainant to prepare and execute a Will that;*

- (a) Appointed you as advisory trustee;*
- (b) Provided for remuneration of professional trustees;*
- (c) Bequeathed you a share of her personal property;*
- (d) Bequeathed you the sum of \$10,000.*

1.2.2 *You did not tell the complainant to seek independent legal advice relative to the Will.*

The hearing

[4] The Committee convened on 13 October 2009 to consider the charges against the Member and submissions from counsel. Mr Adam Holloway appeared for the Institute and Mr Michael Parker for Mr B. Mr B attended the hearing. The complainant, as a witness for the prosecution, presented sworn evidence by way of statutory declaration and attended the hearing by telephone conference call for cross-examination and questioning on her evidence.

Procedural matter

[5] By changes to the Constitution and By-laws of the Institute, the former Disciplinary Committee was reconstituted as the Disciplinary Tribunal of the Institute with effect from 1 June 2009. Mr Holloway gave advice to the Tribunal that following consideration of the constitutional changes he believed the Disciplinary Committee no longer exists and the Disciplinary Tribunal is the body that hears matter referred from the Professional Conduct Committee being the body that replaces the Complaints Committee. That advice aligns with the analysis of the Tribunal and it was agreed that henceforth pleadings should be prepared as coming before the Disciplinary Tribunal, accepting that the Tribunal stands in the place of the Disciplinary Committee referred to in the earlier versions of the Institute's Constitution and By-laws.

The Member's plea and agreed statement of facts

[6] Mr B pleaded guilty to the charge as laid and admitted the particulars to the charge.

[7] An agreed statement of facts was submitted to the Tribunal in which, in addition to acknowledging the particulars in the notice of charges, Mr B acknowledged that he had communicated to the complainant that it was in her interests to execute the Will as prepared by him. In doing so Mr B had a conflict of interest.

[8] Both counsel submitted to the Tribunal that for the purposes of the consideration of the charges against Mr B, the reference in Rule 4 of the Code of Ethics and Professional Conduct to the obligation of members to “comply with and understand relevant law”, the reference to “relevant law” was a reference to the Constitution, Rules and By-laws of the IFA. The Tribunal proceeds on that basis in its consideration of this case.

Submissions and evidence for the Institute

[9] For the Institute, Mr Holloway addressed the charges and specific matters relating to a potential duplication in the manner in which the two charges were articulated. This led to an acceptance by Mr Parker for Mr B that his conflict of interest and potential for his actions to discredit the profession may attract a penalty under the first charge laid. As a result both counsel sought leave to withdraw the second charge.

[10] We note and agree with Mr Holloway’s submission that the Code, when read as a whole, is clearly intended to cover conflicts of interest and disreputable conduct generally and that although none of its By-laws relate specifically to the conduct at issue, Rule 1 provides:

“When representing a client or prospective client's interests the member shall conduct all services in a lawful, prudent and professional manner consistent with the highest standards of honesty, integrity and ethics, ensuring compliance with all the Institute’s Rules, Bylaws, Code of Ethics and Professional Conduct and all other relevant laws. The member shall act in the client’s best interests, above consideration of personal gain.”

[11] Mr Holloway presented two sworn statutory declarations from the complainant as factual evidence of the advice and recommendations Mr B had given her and the nature of their client/adviser relationship. Prior to the hearing the question of the complainant’s availability for cross examination and questioning on her evidence was considered and the chairman of the Tribunal had ruled that she could attend the hearing by teleconference at a time stipulated by the Tribunal.

[12] The complainant was cross-examined on her sworn statements by Mr Parker and answered questions from the members of the Tribunal. Her first statutory declaration

adduced an earlier draft of her Will and the executed copy both of which had been prepared by Mr B. Her second declaration clarified the authorship of various annotations on the draft Will as between herself and Mr B.

[13] The complainant was not able to be shaken on her evidence that she specifically recalled Mr B had asked her “what are you going to give me”, that he suggested the figure of \$10,000 and that she had no knowledge of or involvement in proposing that Mr B should be a beneficiary of any interest in her personal assets.

Submissions and evidence for Mr B

[14] Mr Parker made submissions for Mr B and called Mr B to give evidence, which Mr B gave on oath. Mr B addressed the circumstances of the various discussions he had had with the complainant, the charges, and the particulars, and gave an explanation of what he believed was said at the times of giving the advice and the complainant’s decision to execute the Will he had drafted. Mr Holloway cross-examined Mr B and the Committee asked him questions.

[15] In his formal evidence, Mr B amongst other things:

- Emphasised that right from his first response to the IFA’s advice of the complaint he freely acknowledged that he had made an error of judgement and had not been prudent in agreeing to be included in the complainant’s will;
- Acknowledged that he should have appreciated the conflict of interest inherent in that position;
- Stated he did not ask to be a beneficiary;
- Said he “recommended that the complainant use her existing solicitor for the Will but she said she did not have one and asked me to complete one”;

[16] In his sworn evidence Mr B said “I think I know what the comment ‘what are you going to give me’ relates to although it was not as blatantly said. In the past I have been touched by gestures made by surviving spouses in giving me a small token of their appreciation I could quite easily have made the comment ‘what are you going to give me’ in that context, but certainly not at the time of working on the Will or with any intent of obtaining advantage.”

[17] In his letter of response to the Institute following receiving the letter of complaint (presented in evidence) Mr B advised “While I do lack formal professional qualifications

to produce wills and powers of attorney I am passionate about these issues and have made a point of seeing clients get wills that suit their personal requirements". In questions from Tribunal members he explained his experience in preparing Wills arose over a lengthy period of reading professional writings and Wills drafted by others.

Submissions in reply

[18] Mr Holloway submitted that regardless of any evidential dispute between the parties Mr B'S conduct was serious. He drew attention to the parallel with the Conduct and Client Care Rules for lawyers where the same issue is dealt with explicitly and noted that if a breach of the rule is grave enough it would put a lawyer's practising certificate at issue:

"A lawyer must not draft or assist in drafting a provision of a Will or other instrument under which the lawyer may take a benefit other than a benefit normally attached to acting in a professional capacity in respect of the Will or instrument unless, before the execution of the Will or instrument the person concerned had taken legal advice."

[19] By way of penalty Mr Holloway submitted that the Tribunal should order:

- Censure
- A fine in the range of \$2,000 to \$3,000
- Payment of the Institute's costs in full
- Publication of the decision with Mr B's name if the Tribunal finds that Mr B recorded his position as a beneficiary without being asked to, or without disclosure of his name if the Tribunal finds that the complainant instructed him to record himself as a beneficiary without him proposing that course of action.

[20] Mr Parker submitted that on the evidence, the Tribunal should find that the complainant made a unilateral decision to benefit Mr B and that Mr B, wrongly, allowed events to play out.

[21] By way of penalty, given Mr B's admission of the charges and particulars, Mr Parker submitted for:

- Censure
- A modest fine
- A share of the Institute's cost to be paid, but not full costs;
- Publication of the Tribunal's decision without disclosure of the member or complainant's names.

The Committee's reasoning on penalty

[22] The objective of Rule 4 of the Institute's Code of Ethics and Professional Conduct under which the charges against Mr B were made is recorded as:

"To ensure that the overall reputation of the Institute and the financial services profession is enhanced by the personal actions of individual members or their contractors or employees."

That is the background for the Tribunal's consideration of Mr B's conduct as a member of the Institute having agreed to be contractually bound by the IFA Constitution and By-laws.

[23] Mr B has admitted:

- (a) preparing a Will for the complainant and recommending its execution when under that Will he was:
 - (i) appointed an advisory trustee;
 - (ii) entitled to remuneration for his services;
 - (iii) bequeathed a share of the testator's personal property;
 - (iv) bequeathed the sum of \$10,000.
- (b) failing to tell the complainant to seek independent advice in relation to the Will;
- (c) that he had a conflict of interest in advising the complainant that it was in her interests to execute the Will.

[24] Mr B has pleaded guilty to breaching Rule 4.1 of the Code of Ethics and Professional Conduct by acting in a way that:

- (a) did not reflect credit on the financial services profession or the Institute; and/or
- (b) might bring the reputation of the financial services profession into disrepute.

[25] Although it is not part of the pleadings, we have no doubt that it is not a usual expectation that a financial adviser would be formally trained in the preparation of Wills and Mr B acknowledged in response to questions from the Tribunal that whilst he had an interest and had “read widely on the subject”, he does not have formal training in the law relating to wills and of the drafting of such documents. Apart from the conflict of interest we find that by engaging in the provision of such service as a financial adviser without relevant formal training that this is conduct that is in breach of Rule 4.1.

[26] There is conflict in the evidence as to whether Mr B asked to be made a beneficiary under the will he prepared for his client. The complainant’s evidence is that he asked to be included as a beneficiary and said “what are you going to give me”. Mr B’s evidence is that he did not ask to benefit under the will, but he did acknowledge that it was conceivable that he used those words. On this point we prefer the evidence of the complainant.

[27] Offset against these findings are the following points in Mr B’s favour:

- (a) He has assisted promptly and positively with the Institute’s inquiries into the complaint against him and has readily and helpfully provided evidence and explanations;
- (b) He has recognised the imprudence of his conduct and has expressed genuine regret and contrition;
- (c) On being advised by a legally trained colleague that his actions in providing Will preparation services “could be seen as exceeding (his) capacity as a financial planner and could have ethical challenge “ he desisted from doing so and wrote to all his clients. He has advised the Tribunal that he will not be providing that service in the future;
- (d) He is an experienced financial adviser with long-standing membership of the Institute and its predecessor body and has never been the subject of complaint before this instance;

- (e) He has instructed counsel and has pleaded guilty to the charges and admitted the particulars. He has incurred significant legal costs himself.

[28] Having regard to all of the foregoing, the Tribunal concludes that the seriousness of the events to which Mr B has pleaded guilty warrants significant penalty. We think that his regret and contrition and guilty plea are matters that should be taken into account. We believe Mr B must meet the Institute's full costs of prosecuting the complaint against him and do not accept Mr Parker's submission that a member in these circumstances should be required to meet only a proportion of such costs. To do that would unfairly penalise the other members of the Institute. At \$18,835 (GST inclusive) the costs sought by the Institute, whilst justifiable, are significant.

[29] We conclude that in all of the circumstances, the penalty Mr B should suffer does not extend to publication of his name, but being saved that ignominy demands a monetary fine to reinforce the seriousness of his conduct. We note that \$10,000 is the maximum fine we may order. We believe Mr B has learned an expensive lesson and we do not see him as being a threat to the public if he is permitted to continue to practise as a financial adviser and a member of the Institute.

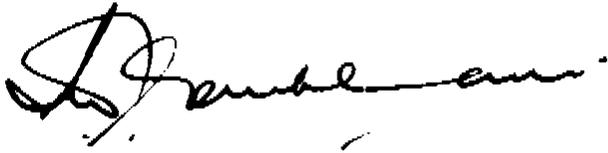
Determination and Orders of the Disciplinary Tribunal

[30] Based on the foregoing findings and reasoning, the Tribunal hereby determines and orders that Mr B:

- (a) be censured;
- (b) pay a fine in the amount of \$3,000 to the Institute;
- (c) pay the Institute the sum of \$18,835 being the full costs of the investigation and disciplinary process relating to the complaint and determinations against him; and
- (d) give an undertaking to the Institute that for as long as he is a member he will not provide services to clients that involve the preparation of Wills.

[31] The Tribunal further orders that the Institute shall publish the findings of the Tribunal in this matter in a manner approved by the chairman of the Tribunal in a way that does not identify the Member, the complainant, or their locations.

By Order of the Disciplinary Tribunal

A handwritten signature in black ink, appearing to read 'A N Frankham', written in a cursive style.

A N Frankham
Chairman
10 November 2009

Legal representation:

For the Institute Phillips Fox (Adam Holloway)
For the Member Michael Parker