In the matter of The Constitution of the Institute of Financial Advisers Inc. and its Bylaws

and

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

Between: The Institute of Financial Advisers Inc.

and: Bruce Ryder, a Member

Determination of the Disciplinary Committee
(Dated 8 May2009)

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

Determination of the Disciplinary Committee

[1] Bruce Ryder, ("Mr Ryder" or "the Member"), a member of the Institute of Financial Advisers ("the Institute" or "IFA"), was the subject of a complaint to the Institute lodged by the complainants in October 2007. Following investigation by the Complaints Committee of the Institute that committee decided to prefer charges against Mr Ryder and to refer those charges to the Disciplinary Committee ("the Committee") for hearing and determination.

[2] Subsequent to the filing of the charges, Mr Ryder, through his solicitors, asserted that the Disciplinary Committee did not have jurisdiction to hear the charges. The reason given was that Mr Ryder had, because of non-payment of his subscriptions, been deemed non-financial and thus was no longer a member subject to the jurisdiction of the Institute or its Disciplinary Committee. The Committee received submissions and legal argument on this issue from the Member and from the Institute (both through counsel) and issued a reasoned decision dated 26 February 2009 in which the Committee made the finding that it did have jurisdiction. Although he reserved his right to do so, the Member did not seek to have the determination of the Committee judicially reviewed by the High Court.

[3] Following the issue of that determination and negotiations between counsel, Mr Ryder agreed to plead guilty to the charges on the basis that the Committee would only be required to consider the issue of penalty. Mr Ryder advised that he did not wish to attend a hearing. The Committee agreed a timetable for written submissions on penalty with counsel and for the Committee to consider the issues on the documents but for counsel to participate at the commencement of the hearing by conference call to answer any questions from the Committee. The Committee convened a hearing for Friday 20 March 2009 to consider submissions from the parties on penalty. Following questions raised in writing by the chairman of the Committee before the hearing, issues requiring clarification became apparent:

(a) In submissions for the Member dated 17 March Shieff Angland, confirmed that Mr Ryder pleaded guilty to the charges as laid but did not admit three of the particulars. The lawyers also submitted that the member "has accepted responsibility for his actions and has reached a settlement with [the complainants] to compensate them for the losses they have suffered arising from the failure of Bridgecorp".

(a) As a result of the chairman's written questions the Committee was told in a letter from the Member's counsel received after 6:00 pm on the evening before the hearing, "Mr Ryder has offered to pay [the complainants] [a disclosed material sum] by way of 18 monthly instalments with other terms and conditions to be agreed. Negotiations with [the complainants] concerning settlement are ongoing."

The charges

[4] The charges against the member and their associated particulars were:

"***First charge***

Professionalism and appropriateness of advice

That you, Bruce Ryder, being a member of the Institute and acting in your professional capacity, did breach Bylaw 1.2 and Rule 11 of the Code of Ethics and Professional Conduct in force during the relevant time.

Particulars

(a) In or about March 2006 you recommended Bridgecorp Limited secured debentures to the complainants as being appropriate for the investment of $100,000 by the complainants.

(b) In providing that recommendation to the complainants you had knowledge that:

(i) $100,000 was all of the complainants' funds available for investment, being equity from the sale of their home at Milton.

(ii) The complainants needed and wished to preserve these funds for any future home purchase.

(iii) The complainants were unsophisticated investors who were reliant on your advice.

By providing the recommendation in paragraph (a) with the knowledge in paragraph (b) you did not:

(c) provide a recommendation in accordance with Bylaw 1.2 that was appropriate to the complainants' needs and circumstances after taking into account their wishes; and/or

(d) ensure that your advice was appropriate and in the best interests of the complainants in accordance with Rule 11.

Second charge

Competence

That you, Bruce Ryder, being a member of the Institute and acting in your professional capacity, did breach Rule 2 of the Code of Ethics and Professional Conduct in force during the relevant time.

Particulars

(e) In or about March 2006 you recommended that, to obtain taxation benefits, the complainants invest in the name of the wife the proceeds of selling the husband's property.

(f) In providing that recommendation to the complainants:

(i) *you gave advice in an area in which you did not have competence; and/or*

(ii) *you, lacking experience, sophistication and competence in the area of taxation, did not ensure that the complainants sought independent advice; and/or*

(iii) *you, not being professionally qualified to practise in the field of taxation, gave the impression you were providing taxation advice.*

Third charge

Disclosure

That you, Bruce Ryder, being a member of the Institute and acting in your professional capacity, did breach Bylaw 5.1 of the Code of Ethics and Professional Conduct in force during the relevant time.

Particulars

(g) *In or about March 2006 you recommended Bridgecorp Limited secured debentures to the complainants as being appropriate for the investment of $100,000 by the complainants.*

(h) *In providing that recommendation to the complainants, you did not supply to the complainants a written disclosure document.*

Fourth charge

Extent and type of service

That you, Bruce Ryder, being a member of the Institute and acting in your professional capacity, did breach Rule 10 of the Code of Ethics and Professional Conduct in force during the relevant time.

Particulars

(I) *In or about March 2006 you recommended Bridgecorp Limited secured debentures to the complainants as being appropriate for the investment of $100,000 by the complainants.*

(j) *In providing that recommendation to the complainants you did not:*

i. *clearly define and explain to the complainants the financial services being provided; and/or*

ii. *supply the complainants with a written statement that complied with Bylaws 10.1 and 10.2.*

Fifth charge

Inadequate research

That you, Bruce Ryder, being a member of the Institute and acting in your professional capacity, did breach Bylaw 11.2 of the Code of Ethics and Professional Conduct enforced (sic) during the relevant time.

Particulars

(k) in or about March 2006 you recommended Bridgecorp Limited secured debentures to the complainants as being appropriate for the investment of $100,000 by the complainants.

(l) In providing that recommendation to the complainants, you did not ensure that reasonable research had been made regarding Bridgecorp Limited secured debentures.

The hearing

[5] As noted, the Member having pleaded guilty to the charges as laid, the hearing was set for the Committee to consider the issue of penalty on the documents with counsel appearing by telephone conference call to answer questions from the Committee. Mr Adam Holloway appeared for the Institute and Ms Kim Burkhart for Mr Ryder. Mr Ryder was not present.

[6] At the outset, Ms Burkhart confirmed Mr Ryder's guilty plea to the charges and advised that Mr Ryder now admitted all of the particulars save for particular (b) (iii) under the first charge, namely that the complainants were unsophisticated investors who were reliant on [his] advice. Ms Burkhart advised the Committee that whilst her instructions at the time of filing submissions were that the Member and the complainants had achieved a settlement her inquiries of Mr Ryder following the chairman's written questions had revealed that no settlement had been reached but negotiations were continuing.

[7] The chairman expressed concern that but for his questioning the Committee might have been incorrectly informed of the status of settlement negotiations. The terms of a final settlement might be a matter for the Committee to take into account when considering penalty, but the Committee would only make such consideration if the complainants and the Member have agreed a settlement and advise the Committee of the terms of that settlement. The chairman said that the Committee could not have regard to the terms of a possible settlement but was concerned that if the Committee proceeded to a determination without having the opportunity to consider the terms of a settlement, that might reduce the chance of a settlement being achieved thereby disadvantaging the complainants. He ruled that the Committee's consideration of penalty would continue on the documents without reference to a settlement, but Mr Ryder would have until 20 April 2009 to conclude a settlement with the complainants and to advise the Committee of the terms thereof. If the Member and the complainants achieved an unconditional settlement and the Committee advised of its terms by that date the determination would take account of the settlement on its terms to the extent the Committee considered it appropriate.

Therefore, the Committee would issue no written determination on penalty before 20 April 2009.

Counsel retired from the conference call at this point.

Submissions for the Institute on penalty

[8] In written submissions counsel for the Institute Mr Holloway submitted that Mr Ryder has indicated that he will not contest charges that he breached bylaw 1.2 and rule 2, which state:

- Members must provide recommendations that are appropriate to the client's needs and circumstances, after taking into account the client's wishes.
- Members must perform services in a competent, efficient and business-like manner. Advice on financial services shall only be offered in those areas in which the member has competence.

Not contesting that he breached this bylaw and rule makes it impossible for Mr Ryder to deny simultaneously the elements of the respective charges that his recommendation to invest in Bridgecorp was not appropriate to the complainants' needs and circumstances after taking into account their wishes. Nor was the recommendation in the complainants' best interests. His tax recommendation was in an area Mr Ryder acknowledges he did not have competence.

[9] Counsel submitted that while Mr Ryder has indicated that he would not contest the notice of charge:

(a) This occurred at a late stage;
(b) He continues to deny elements of the charges within the notice of charge; and
(c) Mr Ryder's indication followed significant delay and argument resulting from his objection to the jurisdiction of the Institute.

[10] It was submitted that Mr Ryder is an experienced and long-standing member of the IFA. While he can demonstrate a record free from similar complaints, it is also the case that he should have known better.

- The conduct underpinning the charges was serious. Mr Ryder was a trusted adviser to relatively naïve and inexperienced investors. The money the complainants had to invest was the equity from their home, which they required to re-enter the housing market at a later date. The money was not merely a portion of funds involved in a wider investment strategy.
- The complainants' needs and circumstances should have been plain to an experienced adviser like Mr Ryder. It should have been equally obvious that

investing the lion's share of the complainants' assets in a relatively risky financial product was inappropriate.

- The complainants are people of modest means. The loss of their investment has had a material impact on their lifestyle and choices. To date they have been unable to purchase another home.
- The sanction imposed on Mr Ryder should be sufficient to punish him appropriately, to deter similar actions by other members of the IFA, and to engender public confidence. The disciplinary bylaws recognise that in some cases a commercially significant sanction may be necessary. This may result either directly from a requirement to pay costs or a fine, or alternatively from the consequences of publication or loss of membership status.
- Consideration may be given to ensuring that the complainants receive a remedy. Counsel understands that Mr Ryder may submit that some compromise has been reached with the complainants. If that is the case, the Compliance Officer accepts the Committee can and should take it into account.
- Any sanction imposed should reflect the nature and seriousness of the breach of the Code. Counsel noted that the notices of charge detail five separate breaches.

Penalties sought

[11] On the basis of those matters set out above, Mr Holloway submitted on behalf of the Compliance Officer that a penalty comprising the following would be appropriate:

(a) Payment of the IFA's costs in full as set out in the agreed statement of facts;
(b) A modest fine;
(c) Censure; and
(d) Publication of details of the Committee's decision, including Mr Ryder's name.

[12] The Committee notes that after the preparation and filing of submissions on penalty for the Institute Mr Ryder admitted important particulars that he earlier denied. The newly admitted particulars are:

(a) *By providing the recommendation in particular (a) under the first charge with the knowledge in particular (b) he did not:*

(i) provide a recommendation in accordance with Bylaw 1.2 that was appropriate to the complainants' needs and circumstances after taking into account their wishes; and/or

(ii) ensure that his advice was appropriate and in the best interests of the complainants in accordance with Rule 11.

(b) *In providing that recommendation to the complainants he gave advice in an area in which he did not have competence;*

Submissions for Mr Ryder on penalty

[13] For Mr Ryder Ms Burkhart submitted;

- Mr Ryder is not contesting these charges because he accepts that he has acted in breach of the Code, which, as a member of IFA, he agreed to adhere to.
- Mr Ryder is also acutely aware of the effect this investment has had on the complainants and he recognises that it was his advice that caused them to invest in Bridgecorp Limited (albeit that he does not accept that Bridgecorp Limited was a "bad" investment at the time he gave the advice, which is dealt with further below). In recognition of this, he is negotiating to pay the complainants compensation for their loss.
- while Mr Ryder has pleaded guilty to a breach of bylaw 1.2 (Members must provide recommendations that are appropriate to the client's needs and circumstances, after taking into account the client's wishes) he does not accept that the complainants were unsophisticated investors who were reliant on Mr Ryder's advice. It is not inconsistent for Mr Ryder to accept that he has provided recommendations that are not appropriate to the complainants' needs and circumstances (i.e. that he has breached the bylaw) but not accept that they were unsophisticated investors (i.e. not accept the particular).
- The Institute's constitution and bylaws do not state that a guilty plea amounts to acceptance of all the particulars of each individual charge. If this is what the IFA intended, the Rules (which govern this process and provide the only available guidance to members as to how this process will occur) should state this.
- This is Mr Ryder's first offence in his 20 years as a member of the IFA.

Re*medy for the Aggrieved Consumer/Attitude of the Member?*

[14] Mr Ryder is acutely aware of the effect that this investment has had on the complainants' lives. Accordingly, he has accepted responsibility for his actions and has made [is negotiating] a settlement with the complainants to compensate them for the losses they have suffered arising from the failure of Bridgecorp.

[15] While it is accepted that it is appropriate for the Committee to impose a penalty on Mr Ryder given that he has accepted he has breached the Code, it is submitted that a monetary penalty is unduly harsh in circumstances where the aggrieved consumer (who has actually suffered the loss) will be compensated, at significant and ongoing financial cost to Mr Ryder.

Deliberate Breach?

[16] Mr Ryder did not deliberately act in breach of the Code. Four of the five charges against Mr Ryder centre on an allegation that Mr Ryder's recommendation to invest in Bridgecorp Limited was inappropriate. It was submitted that a reasonably competent adviser may have recommended an investment in Bridgecorp in 2006 for the following reasons:

(a) Bridgecorp's June 2005 accounts showed a company that was profitable, liquid, and well capitalised in comparison to other finance companies. The accounts showed an equity ratio of 14.7%.
(b) Rapid Ratings gave Bridgecorp an upgraded B3 rating in the second half of 2005.
(c) The website interest.co.nz gave Bridgecorp an AAA SOP rating, which was not a credit rating per se, but effectively rated Bridgecorp in the top 20% of finance companies in the areas of strength, quality and performance.
(d) In late 2005 North Plan commissioned PIR to do a detailed research assessment of Bridgecorp. Although this was not published until mid-2006, PIR gave Bridgecorp 4 stars out of 5.

[17] As it transpired, the investments in Bridgecorp were offered pursuant to prospectuses that were not compliant with all statutory requirements. Indeed Bridgecorp has now pleaded guilty to charges relating to the issue of prospectuses that were not compliant with the Securities Act. A reasonably competent adviser in 2006 would have had no knowledge that misleading information was being provided about the company. All information that was available (referred to in paragraph 16 above) suggested that the company was in good shape and a secure investment.

[18] It was submitted that it is inappropriate to consider Mr Ryder's investment advice with the benefit of hindsight. The appropriate assessment must be an assessment as to whether the recommendation was reasonable in the circumstances at the time.

[19] The remaining charge is the breach of bylaw 5.1. It is Mr Ryder's usual practice to supply a copy of his disclosure document to all new clients. Regrettably, at the time he saw the complainants he did not keep a copy of the disclosure document on each individual client file, he simply retained an electronic copy of the disclosure document in effect at the particular time. Accordingly, he cannot be sure whether a copy of the disclosure document was given to the complainants and as such, he is not contesting this charge. It was submitted that:
(a) This was not a deliberate breach, but rather a mere oversight.
(b) The failure to provide a disclosure document did not, in any way, affect the quality of advice given to the complainants.

Costs

[20] The legal fees claimed at the date of submission appear to be high, however Mr Ryder has not been provided with any breakdown of those costs. It is submitted that a guilty plea does not simply allow the Committee to recover all costs incurred by the IFA (and the Committee) and that if such costs are to be sought they are to form part of the penalty and ought to be recovered on a principled basis, based on the charges laid and the appropriate penalty, and not simply because those costs have been incurred. Further, it appears that a significant portion of the costs relate to the protest to jurisdiction. The question of jurisdiction arose out of a lack of clarity in the IFA's own

Rules and not any failure on the part of Mr Ryder. Accordingly, it is submitted those costs should not be borne by Mr Ryder. Whilst that protest was ultimately unsuccessful (before this Disciplinary Committee) it must be conceded that the IFA's Rules lacked clarity given that those Rules have now been amended to specifically deal with this very issue.

Publication

[21] It was submitted that there is no public interest benefit in the publication of Mr Ryder's name and nor is there any educative purpose in the publication of his name. This is particularly so in circumstances where he has already entered into a confidential settlement with the complainants to compensate them for their losses. [It is noted that this submission was subsequently acknowledged not to be the case]. Publication of his name might otherwise suggest he has not accepted his responsibility to the complainants. If the decision on penalty is to be published, then it is submitted that the published decision should not include reference to Mr Ryder's name in all the circumstances.

Conclusion

[22] For the reasons given, Ms Burkhart submitted that:

(a) Payment of the IFA's costs in full is unduly harsh and not appropriate in the circumstances;
(b) A fine is unduly harsh and not an appropriate censure in the circumstances;
(c) Censure is appropriate; and
(d) Publication of Mr Ryder's name is unduly harsh and not appropriate in the circumstances.

Submissions in reply from the Institute

[23] Mr Holloway provided submissions in reply to the submissions for Mr Ryder. Those submissions largely dealt with the Institute's right to recover costs and provided details of all the costs for which the Institute sought recovery.

The Committee's decision on the denied particular

[24] By the time of the hearing, Mr Ryder had pleaded guilty on all charges and had admitted all of the pleaded particulars but for the particular recording that in providing his investment recommendation to the complainants the Member had knowledge that the complainants were unsophisticated investors who were reliant on his advice. The Committee has considered the complainants' assertions in this regard and Mr Ryder's explanations and his counsel's submissions that:

(a) In their initial letter of complaint to the Institute dated 27 October 2007, the complainants explained that they are a farming couple with young children working on a farm with living accommodation. They had sold their home, had

$100,000 available for investment, and approached Mr Ryder whom they had known for some time as their insurance agent. They recorded that they were unsophisticated investors reliant on professional advice.

(b) Mr Ryder did not respond to or comment on the complainants' assertions in this regard in his letter of explanation dated 26 November 2007 addressed to the Institute's Compliance Officer.

(c) In their letter to the Compliance Officer dated 11 December 2007 commenting on Mr Ryder's explanations the complainants wrote, "Bruce was not qualified/ competent to provide investment advice knowing us to be a farming couple with young children and unsophisticated investors needing/seeking investment advice on the sale proceeds of our home being our total investment wealth." The complainants' confirmed their position in a sworn witness statement presented to the Committee on the day of the hearing.

(d) In the submissions for Mr Ryder counsel merely stated "he does not accept that [the complainants] were unsophisticated investors who were reliant on Mr Ryder's advice". No other evidence, explanation or comment appears to have been made in support of Mr Ryder's position on this matter.

[25] On the information and explanations before us we consider, on the balance of probability, the complainants' position is the correct one. In the absence of information to the contrary it is a logical conclusion. Mr Ryder has given us no basis to consider otherwise. Therefore, we proceed on the basis that Mr Ryder is guilty of all charges and that all particulars have either been admitted or found proven.

The Committee's reasoning on Penalty

[26] The Committee acknowledges that Mr Ryder's failures are a matter of considerable importance to the complainants. The Committee acknowledges the stress, pressure and emotional pain Mr Ryder's actions have caused the complainants. However, the process is about the IFA acting on a complaint about a member, to ensure maintenance of proper standards and actions by its members and not to compensate a complainant for losses incurred.

[27] By his own admission or by our finding, Mr Ryder:

(a) breached bylaw 1.2 and Rule 11 of the Code of Ethics relating to professionalism and appropriateness of advice;

(b) did not provide a recommendation that was in accordance with bylaw 1.2 that was appropriate to the complainants' needs and circumstances;

(c) did not ensure his advice was appropriate and in the best interests of the complainants in accordance with Rule 11;

(e) provided advice on taxation matters which was an area in which he did not have competence;

(f) although lacking in experience, sophistication or competence did not ensure the complainants secured independent advice;
(g) not being professionally qualified to practise in the field of taxation gave the impression he was providing taxation advice;
(h) breached the disclosure obligations of bylaw 5.1 of the Code of Ethics and Professional Conduct in that he recommended Bridgecorp secured Debentures to the complainants as being appropriate for the investment of $100,000 by the complainants and did not supply a written disclaimer document;
(i) breached Rule 10 of the Code of Ethics and Professional Conduct by recommending Bridgecorp secured Debentures to the complainants as being appropriate for the investment of $100,000 by the complainants and not clearly defining and explaining to the complainants the financial services being provided;
(j) did not supply the complainants with a written statement that complied with bylaws 10.1 and 10.2;
(k) breached bylaw 11.2 of the Code of Ethics and Professional Conduct by not ensuring that reasonable research had been conducted.

[28] We regard these breaches when taken together as being at the upper range of the scale of seriousness. We consider that had the Member observed all of his obligations appropriately, the complainants would unlikely have invested all of their available funds in the recommended investment and would have been unlikely to have suffered the loss and emotional pain they have. These matters must me taken into account when considering penalty. Because of his admission of particulars and our finding on the one particular he denied we consider that when dealing with penalty we are not required to have regard to many of the submissions made on his behalf and recorded in paragraphs 13 to 19 above.

[29] From the papers before the Committee it appears that Mr Ryder has shown few overt signs of contrition or regret. After receipt of the Notice of Charges, he sought to resign from the Institute by letter dated 29 September 2008. When the Institute advised him that the Constitution precluded resignation when disciplinary processes were in train, he contested the jurisdiction of the Institute's disciplinary process by non-payment of his subscriptions. He chose not to appear before the Disciplinary Committee to explain his actions and belatedly advised he would plead guilty to the charges but deny some of the particulars. Finally, he changed his position on the particulars, admitting all but one. We have found that particular proved.

[30] Mr Ryder submitted that settlement negotiations were in train to compensate the complainants for their loss. We delayed the presentation of this determination for a month to permit closure of those negotiations. On 24 April, after an application for extension of time supported by the Complaints Officer, counsel for Mr Ryder advised the Committee that the complainants and the Member had reached a confidential settlement. The settlement involves a significant lump sum payment (in a disclosed

amount significantly higher than the amount initially advised) and the transfer of the Bridgecorp secured debenture stock to the Member. The settlement is subject to confidentiality and does not include any admission of liability by Mr Ryder. Counsel advised that the Member is not covered by any insurance policy for the settlement, any costs we might award or any fine we might order. The Committee notes that Members have an obligation to carry insurance and observes that the absence of cover was for the prosecution to investigate and prosecute if considered appropriate.

[31] By way of response to the Committee's further written questions arising from counsel's advice, at a teleconference on 4 May 2009, between both counsel and the Committee, counsel for the member advised that Mr Ryder had contracted cover but the indemnifier has denied liability relying on the terms of the policy.

[32] The Committee provided counsel for the Institute an opportunity to make submissions on the settlement advice and insurance matter. Counsel submitted that the settlement details may be taken into account by the Committee when considering penalty. Counsel advised that the Compliance Officer does not wish to take any point on the insurance matter.

[33] At the 4 May conference the Committee advised the parties of increased Committee costs arising from the settlement and insurance matters. For the Institute Mr Holloway submitted that there should be an order for recovery of those costs from the Member. Ms Burkhart repeated her earlier submissions on costs.

[34] We think that when considering penalty we should have some regard to the settlement the Member has made. It forms part of the cost of the Member's recognition of the loss to the complainants even though there has been no admission of liability. It is relevant to note acceptance of the advice that the financial costs of penalty faced by the Member are not reduced by insurance.

[35] With regard to the recovery of costs, Ms Burkhart made four substantive points in submission. We note these below together with our responses:

(a) *"If the Committee is minded to determine the issue of costs that reflects the way in which other such cases have been dealt with then natural justice requires that Mr Ryder be informed of the principles to which the Committee refers and be given an opportunity to respond."*

The Committee determines orders for costs on the circumstances of each case. As a general principle, the Committee will follow the approach that costs follow the event. Where all of the charges against a member are found proved or costs have been incurred prior to a guilty plea being entered full costs will be awarded unless they are unreasonable or exceptional circumstances apply.

We agree with the submission for the Compliance Officer – "The IFA is an organisation funded by its members. To the extent that the IFA incurs costs as a consequence of one member failing to live up to its rules, it is unfair to require other members who have done no wrong to subsidise the consequences of such breach through their membership fees. The disciplinary function of the IFA may be undermined if it consistently under-recovers the costs of disciplinary processes. The IFA's only method of funding this work would be to increase its membership fees. This can only discourage membership and reduce the IFA's ability to achieve its mission "To foster professionalism among financial advisers and to serve the needs and interests of members and the public."

We also note the 21 July 1995 decision in Galvin v. BLB before the IAFP Board of Appeal that provides useful guidance. With regard to costs, the Board in that instance said (at page 32 f.):

> *"It seems to the Board in cases of this level of seriousness there is nothing inherently unfair or improper in requiring an offending member to pay all of the costs incurred by the Association at the trial level, i.e. ail the costs and charges incurred by the Association including the costs of the investigation as well as the costs of prosecuting or complainant's counsel or counsel assisting. In this case, the award was a little over 35% of the actual costs incurred. Thus, if anything, the appellant was treated leniently on costs. In our view, and especially considering the self-funding, self-regulatory nature of the Association, it is entirely appropriate that the general rule should be that the offending professional should pay the whole of the costs involved in the investigation and prosecution of the disciplinary proceedings. However, one can visualise situations where a full 'indemnity would not be appropriate. Such situations might include cases of inadvertent or trivial breaches and cases where there had been some ambiguity in the Rules or in the Code of Ethics and a resultant difficulty in understanding the standards which were expected of the member."*

(b) *"The costs claimed are high and Mr Ryder has not been provided with any breakdown."*

We acknowledge that the costs are significant. That is the unfortunate nature of professional fees. We are satisfied that the costs have been necessarily incurred. Ms Burkhart was provided details of the costs sought to be recovered by the Institute immediately before and at the hearings. No reservation about the detail was expressed.

(c) *"a guilty plea does not simply allow the Committee to recover all costs incurred by the IFA (and the Committee) and that if such costs are to be sought they are to form part of the penalty and ought to be recovered on a principled basis, based on the charges laid and the appropriate penalty, and not simply because those costs have been incurred."*

The Committee makes orders concerning costs on a principled basis.

(d) *"it appears that a significant portion of the costs relate to the protest to jurisdiction. The question of jurisdiction arose out of a lack of clarity in the IFA's own Rules and not any failure on the part of Mr Ryder. Accordingly, it is submitted those costs should not be borne by Mr Ryder. Whilst that protest was ultimately unsuccessful (before this Disciplinary Committee), it must be conceded that the IFA's Rules lacked clarity given that those Rules have now been amended to specifically deal with this very issue".*

The Committee has carefully considered this issue. Of the total costs claimed amounting ultimately to $30,038, $6,825 relates to the cost of addressing Mr Ryder's assertion that the Committee did not have jurisdiction. We consider the question of jurisdiction did not arise from a lack of clarity in the Rules. Rule 10.1 of the Constitution makes it very clear that a Member cannot effectively resign while disciplinary proceedings against the Member are pending. The reasoned decision of the Committee on that matter recorded "We think the analysis presented for Mr Ryder is an attempt to avoid exposure to the disciplinary process that the member agreed to submit to contractually for the good of the profession, the maintenance of standards and the protection of the public. We cannot accept that, whereas the contract documents applicable at the time of the alleged breaches provided that a member should not be able to avoid the disciplinary process by resigning, the member should nevertheless be able to avoid the process by simply not paying a subscription."

Having regard to that finding, we consider it appropriate that Mr Ryder should be required to meet the costs incurred by the Institute in having the jurisdiction matter determined. The Committee determined that matter in conjunction with the application of another Member citing similar grounds. We are satisfied that each member was charged his appropriate share of those costs.

[36] We are not persuaded by the submissions made on Mr Ryder's behalf that an order for less than full costs claimed and full publication should not apply. By all accounts, Mr Ryder has been a competent member of the Institute advising on insurance matters where his experience and skills lie. In the circumstances of the complainants' request for investment advice he has stepped outside his sphere of experience and has failed to follow the Institute's mandatory bylaws and rules. In doing so, he has caused or significantly contributed to the losses suffered by his clients. We agree with the submission on behalf of the Compliance Officer that the sanction imposed on Mr Ryder should be:

- sufficient to appropriately punish him,
- to deter similar actions by other members of the IFA, and
- to engender public confidence.

The disciplinary bylaws recognise that in some cases a commercially significant sanction may be necessary.

[37] If it were not for the settlement made by Mr Ryder to recognise, at least in part, the loss and emotional pain the complainants have suffered, we would have ordered that Mr Ryder should suffer a monetary penalty. Having regard to the quantum of the settlement and the order for costs we consider we must make, we make no order for a fine in this instance.

Determination and Orders of the Disciplinary Committee

[38] The Member having pleaded guilty to the charges as laid and the particulars having either been admitted or found proven, the Committee makes the following orders as to penalty, costs and publication.

The Committee hereby orders that Bruce Ryder:

(a) be and is hereby censured;

(b) is to meet the costs to the Institute of the disciplinary process in the amount of $30,000 inclusive of GST this amount to be paid to the Institute forthwith;

(c) is not to provide professional financial planning or investment advice for as long as he is a member of the Institute unless he has obtained and proves to the Institute the relevant qualification as per the Institute's or statutory requirements and,

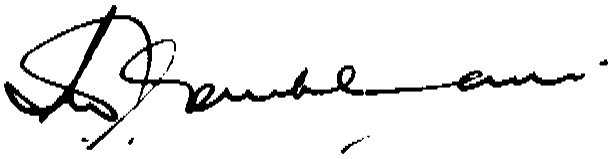
(d) taking into account the circumstances of this case, the Committee's reasoned determination giving the member's name and location be published by the Institute in a format approved by the chairman of this Committee and placed on the website of the Institute in a manner accessible by the public. The name and location of the complainants and the amount of the settlement shall remain confidential.

[39] With regard to item (b and c) of paragraph [38], the Committee notes that notwithstanding the Member's letter of resignation the Member continues to be bound by clause 10.1 of the Institute's Constitution that provides:

> *"Any notice of resignation given after any complaint is lodged against the Member or after any disciplinary proceedings are commenced against the Member shall not take effect until the hearing of the complaint or the disciplinary proceedings and related appeals have been disposed of and any resulting action or disciplinary measure, fine or penalty has been settled".*

Consequently the Member is also bound to continue to pay his subscriptions to the Institute and to observe all other requirements of the Constitution until all disciplinary measures, fine, costs or other penalty have been settled.

By Order of the Disciplinary Committee



A N Frankham
Chairman
8 May 2009

Legal representation:
For the Institute *DLA Phillips Fox (Adam Holloway)*
For the Member *Shieff Angland (Kim Burkhart)*

Tony Frankham

Digitally signed by Tony Frankham
DN: cn=Tony Frankham, o, ou, email=anf@anf.co.nz, c=NZ
Date: 2009.05.09 15:45:54 +12'00'