

IN THE MATTER OF: Financial Advisers Act 2008

BETWEEN: **FINANCIAL MARKETS AUTHORITY**

Complainant

AND: **A**

Respondent

Committee Panel: David Macdonald (acting Chair)

Tracey Berry

Simon Hassan

Counsel: J. Corcoran/R. Manttan for the Complainant

R. Woods/H. Twomey for the Respondent

Date of Decision: 4 September 2018 (on the papers)

DECISION OF THE COMMITTEE AS TO DISPOSITION

Solicitors/Counsel:

Financial Markets Authority, PO Box 106 672, Auckland 1143

Email: Rachael.Manttan@fma.govt.nz

Robertsons Law, Barristers and Solicitors, PO Box 2068, Shortland Street, Auckland 1140

Email: htwomey@robertsonslaw.co.nz

INTRODUCTION

1. On 29 March 2018, the Financial Markets Authority (**FMA**) referred a complaint against an Authorised Financial Adviser (**AFA**) to the Financial Advisers Disciplinary Committee (the **Committee**). The complaint alleged breaches of the Code of Professional Conduct for Authorised Financial Advisers (the **Code**) in relation to Code standards 6 and 12.
2. The AFA admitted breaches of Code standards 6 and 12, on the basis of an Agreed Statement of Facts attached as **Annex A**.
3. The Committee then sought submissions from both parties on the way the matter should be disposed of.

DISPOSAL ON THE PAPERS

4. Having received full written submissions we are satisfied that the matter of penalty can be appropriately dealt with on the papers. Both parties submitted that the proceeding was capable of being determined in this manner, and that doing so would allow the matter to be brought to a conclusion as efficiently as possible. As neither side sought a hearing, the Committee is content to proceed without one.

ISSUES FOR DETERMINATION

5. The issues for determination, based on submissions from the parties, are whether the Committee:
 - (a) Orders any disciplinary actions, namely censure and a single on-site monitoring visit to be arranged by FMA staff within six months; and
 - (b) Makes any permanent non-publication orders of the Respondent's name and identifying details.

DISCIPLINARY OPTIONS FOR CODE STANDARD BREACHES AND RELEVANT FACTORS

6. The options available to the Committee to sanction Code breaches are set out in section 101(3) of the Financial Advisers Act 2008 (**the Act**). Rule 29 of the Committee's Procedure Rules states the factors the Committee may weigh in its consideration of penalty. The objective in considering the factors is to protect the public and set professional standards, while arriving at a penalty that is the least imposition on the Respondent that is reasonable: *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand*¹, cited in *FMA v X*.²
7. Applying the relevant factors, the Committee notes:
 - (a) The conduct in question has been fairly described by both parties as being at the lower end of the scale of concern. There is no question of dishonesty on the part of the Respondent, however there were gaps and delays in how they carried out their role, which was not in the spirit or the letter of the law;

¹[2012] NZHC 3354.

²[2014] FADC 005.

- (b) There has been no identified loss for any client of the Respondent, and the Respondent did not appear to have gained any material advantage as a result of the breaches. The Committee notes however, the nature of insurance products means that the impacts of an incorrect process being followed may not be revealed for some time and, while the probability of loss occurring is low, the consequences for the client in question could be seriously adverse;
- (c) The breaches reflect shortcomings in technical performance and attention to important detail and require a moderate response in the interests of the public and adviser profession;
- (d) It is significant that the Respondent accepted the breaches of the Code without the need for a hearing, which is consistent with achieving a just and speedy outcome of the matter. The Respondent cooperated with the FMA's investigation, and has no prior findings of misconduct against them;
- (e) Prior to the referral from the FMA, the Respondent completed a supervisory programme instigated and overseen by their Qualifying Financial Entity (QFE), which began in April 2016 and concluded in February 2018. Upon learning of this, the FMA discussed the supervisory programme with the QFE and reviewed the criteria the Respondent was monitored against, and submitted it was satisfied that the supervisory programme was comprehensive;
- (f) The client transactions and conduct that gave rise to the breaches took place between June 2013 and March 2014. The FMA's investigation into the matter has been ongoing since May 2016, with the Respondent interviewed by the FMA in August 2016. The Committee notes the concerning length of time taken by the FMA to complete its investigation and the time passed since the events in question.

PENALTY ORDERS

8. Taking all these matters into account and the submissions made by counsel for each party, the Committee orders, under section 101(3)(d) of the Act, that the Respondent is censured for the Code breaches they admitted.
9. This serves to highlight that the breaches acknowledged by the Respondent are unacceptable in a professional person holding the qualification of AFA. This order comprises the least restrictive and reasonable imposition on the Respondent, consistent with the objectives of admonishing the Code breaches.
10. The FMA sought an order from the Committee that a single on-site monitoring visit be arranged with FMA staff within six months. We do not consider that this is necessary. The Respondent has demonstrated that changes have been made. The FMA accepted that the supervisory programme with the QFE was comprehensive and it is not clear to us why another visit is needed. We note that this would cause further anxiety and uncertainty to the Respondent, who has been subject to an already lengthy process. Further, we note it is open to the FMA to supervise AFAs under their ordinary functions.

PUBLICATION AND PERMANENT SUPPRESSION OF IDENTITY

11. The Committee may publicly notify disciplinary action in any way it thinks fit³. The default position is to publish decisions of this nature, including the names and identifying details of the Respondent, unless the Committee is satisfied that exceptional circumstances apply.
12. In *FMA v X*⁴, to which the FMA referred, the Committee noted that this case “is out of the ordinary because the acknowledged breaches have resulted in no known financial losses to the AFA’s clients” and that the requirement, by regulation, to disclose any disciplinary action to prospective clients⁵ meant that in totality the circumstances were exceptional.
13. The Committee is satisfied, for much the same reasons as in that case, that the publication of the Respondent’s identity is not warranted. We consider that the required disclosure is appropriate, given the acknowledged Code breaches (we note that the Respondent has a 200 word limit to advise clients of the nature and extent of the disciplinary proceedings, the supervisory programme undertaken and the timeframes of the breaches) and this is a sufficient protective mechanism for the public.
14. Further, we consider that the publication of this case will clearly demonstrate to AFAs the nature, extent and seriousness of their obligations to keep proper records.
15. We therefore make a permanent order under section 101(6) of the Act that any published record of the Committee’s decision must exclude any identification of the Respondent or their business. The published content of the annexed Agreed Statement of Facts must be redacted to that end.

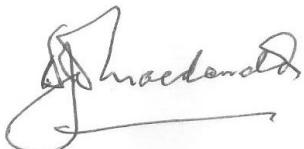
COSTS

16. No orders were sought as to costs.

NOTIFIED RIGHT OF APPEAL

17. Having imposed the penalty referred to in para 8 above, the Committee is required by Procedure Rule 30(2) to advise the Respondent that they may appeal this decision under section 138(1)(b) of the Act. Such appeal must be made within 20 working days of the date this decision is communicated or within such further time as a District Court Judge allows upon application made before or after the standard period expires.

DATED: 18 September 2018



David Macdonald
For the Financial Advisers Disciplinary Committee

³ Section 101(6) of the Act.

⁴ See n2.

⁵ Financial Advisers (Disclosure) Regulations 2010, Schedule 1