Financial Advisers Committee **2016 FADC 006**

IN THE MATTER OF:	Financial Advisers Act 2008
BETWEEN:	**FINANCIAL MARKETS AUTHORITY**
	Complainant
AND:	**XYZ**
	Respondent
Committee Panel:	Hon Sir Bruce Robertson (Chairman)
	Geoffrey Clews
	Peter Houghton
Counsel:	S. Burnett Lanauze for Complainant
	J. Morrison for Respondent
Date of Decision:	22 August 2017 (on the papers)

DECISION OF THE COMMITTEE AS TO DISPOSITION

Solicitors/Counsel:

Financial Markets Authority, PO Box 106 672, Auckland 1143

Email: Simone.BurnettLanauze@fma.govt.nz

John M Morrison, Barrister, P O Box 5029, Wellington 6145

Email: john@johnmmorrison.co.nz

A INTRODUCTION

1. The Respondent faced a complaint of multiple Code Standard ("**CS**") breaches. During the course of a daylong hearing, he acknowledged breaches of CS 12 in having failed to maintain records with the diligence expected of an AFA. Following the hearing, this Committee concluded that the FMA had also made out breaches of CS 6(b) and 6(c). It held, however, that the greater number of CS breaches alleged by the FMA, including serious allegations of a lack of integrity and of bringing the adviser profession into disrepute, were not made out. The Committee sought submissions on the way the case should be disposed of in respect of those CS breaches that were established.

B DISPOSAL ON THE PAPERS

2. Having received full written submissions we are satisfied that the matter of penalty can be dealt with on the papers. That is the FMA's express preference for disposition and the Respondent reserved the right to be heard only if the Committee was minded to impose a costs award, but was otherwise available if the Committee elected to go beyond an "on the papers" consideration of matters.

3. The FMA does not seek a costs award. Given the outcome of the hearing, a costs award against the Respondent would not be appropriate. On this basis, neither side seeks a hearing and the Committee is content to proceed without one.

C OPTIONS TO SANCTION CS BREACHES AND RELEVANT FACTORS

4. The options available to the Committee to sanction CS 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]

5. Applying the relevant factors, the Committee notes:

   (a) The established CS breaches are fairly described by the FMA as at the "lower end of the scale though significant." They certainly cannot be dismissed as inconsequential, but neither are they breaches of dishonesty or impropriety. No client has complained and there is no evidence of loss to the clients whose files were the focus of the FMA's investigation. The breaches reflect shortcomings in technical performance and attention to important detail. Accordingly, they require a moderate response in the interests of the investing public and adviser profession;

   (b) Although the Respondent acknowledged breaches only of CS 12 at hearing (and none before), it is fair to say that a hearing was inevitable once the FMA chose to proceed with the serious allegations referred to above, which ultimately were not made out. Had the FMA not taken that step, the Respondent may have acted differently. He was quite

---

[1] [2012] NZHC 3354.
[2] [2014] FADC 005.

entitled to test the range of allegations made against him, given their scope and seriousness;

(c) The Respondent cooperated with the FMA's investigation and has no prior findings of misconduct.

D PENALTY ORDERS

6. Taking all these matters into account and the submissions made by counsel for each party, the Committee makes the following penalty orders:

   (a) Under section 101(3)(d) of the Act, the Respondent is censured for the CS breaches that have been made out. This serves to denounce the breaches as unacceptable in a professional person holding the qualification of AFA;

   (b) Under section 101(3)(e) of the Act, the Respondent is required not to perform any financial adviser service except under supervision in accordance with, and for the duration of, the supervision plan that is annexed to this decision and has been agreed between the parties. Upon completion of the supervision plan, he should be free to provide financial adviser services on a normal basis.

7. These two orders comprise the least restrictive and reasonable imposition on the Respondent, consistent with the objectives of admonishing his CS breaches and improving his future professional performance in the interests of the public and the profession.

E NO MONETARY PENALTY WARRANTED

8. Despite submissions to the contrary from the FMA, the Committee does not consider that this case warrants a monetary penalty. In most circumstances, the Committee would expect to impose some monetary penalty when CS breaches are made out. Such an imposition is important to underscore that CS breaches carry consequences. There are two main reasons for our not adopting that approach here.

9. First, the Respondent has effectively been suspended as an AFA pending the outcome of this case. The submissions of his counsel informed us of the Respondent's current modest income and we infer that the Respondent has experienced an appreciable monetary cost because his AFA status, which expired on 28 February 2017, was not renewed while this case was unresolved. Secondly, the Respondent has no doubt been put to considerable cost in successfully defending most of the allegations the FMA ranged against him.

10. One further observation overlays these factors. From the testimonials we received with Mr Morrison's submissions, it appears the Respondent has found the process of audit, complaint and the proceedings before this Committee, bruising to say the least. We have little doubt that he will undertake the ordered supervision plan genuinely hoping to learn from the challenging process he has experienced. In all the circumstances, a monetary penalty is not required in this case to admonish CS breaches and amplify the importance of the Respondent's future compliance with professional standards.

11. As to the level at which a fine might have been struck, we do not accept the FMA's suggestion in submissions that the Committee may somehow have set a "tariff" of $1,000 per CS breach.

Any fine we might have contemplated in this case would have been more modest, but would add nothing to the professional consequences of censure that for the next five years the Respondent must disclose to all prospective clients.[3]

F REQUESTED PRIMARY DISCLOSURE ORDER AND PERMANENT SUPPRESSION OF IDENTITY

12. As to such disclosure, the FMA sought an order that the Respondent be required to include reference to the Committee's findings in any primary disclosure he is required by regulation to make to prospective clients. Such an order is not within the jurisdiction conferred on the Committee under section 101(3) and (5) of the Act, unless it is seen to fall within the possible conditions the Committee might impose under section 101(3)(e). We prefer not to deal with the FMA request in this way. The regulations as to client disclosure apply, whatever the Committee decides, and we note that the agreed supervision plan that underpins our order at para 6(b) includes revision of the Respondent's primary disclosure document to accord with the regulations. Nothing more is required.

13. The Committee's observations about client disclosure made in *FMA v X*[4], to which the FMA referred, were not by way of a disclosure order. The panel noted there that the disclosure to prospective clients, required by regulation, meant that more general publication of the adviser's identity was not warranted. For much the same reasons as in that case, there will be a permanent order under section 101(6) of the Act that any published record of the Committee's decisions on CS breaches and disposition must exclude any identification of the Respondent or his business. The published content of the annexed supervision plan must be redacted to that end.

G NOTIFIED RIGHT OF APPEAL

14. Having imposed the penalty referred to in para 6 above, the Committee is required by Procedure Rule 30(2) to advise the Respondent that he 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 to him or within such further time as a District Court Judge allows upon application made before or after the standard period expires.

DATED: 22 August 2017

Geoffrey Clews

For the Financial Advisers Disciplinary Committee

---

[3] Regulations 4 and 5 and Schedule 1, Financial Advisers (Disclosure) Regulations 2010.

[4] See n 2.