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Cahir, N.Z Law Rep (3) X

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

A.30/84

917

No Special Consideration

IN THE MATTER of Part I of the Judicature Amendment Act 1972

AND

IN THE MATTER of an application for review by DAVID JOHN MARTIN of Auckland, life underwriter

BETWEEN DAVID JOHN MARTIN

Applicant

AND LIFE UNDERWRITERS' ASSOCIATION OF NEW ZEALAND (INCORPORATED)

Respondent

Hearing 24 July 1984

Counsel A E L Ivory and J M Holland for Applicant
D J White and M R Burrowes for Respondent

Judgment 3 August 1984

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JUDGMENT OF DAVISON C.J.

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This is an application for judicial review. The applicant is a Life Insurance Underwriter who is a member of the Life Underwriters' Association of New Zealand (Incorporated) ("the Association"). He was charged by the Ethics and Practice (National) Committee of the Association by letter dated 26 January 1984 with an offence against the Association in his dealings with the policy-owners C & R Tipene and others in that in their opinion he was in breach of Codes 6 and 8(d) of the Code of Ethics.

A hearing date was fixed for 15 February 1984 but the hearing was deferred to enable the applicant to seek a judicial review of the Association's powers. The applicant now seeks -

(a) A declaration that Rules 6 and 8 of the Code of Ethics and Professional Guidelines of the

Association are void and invalid and unenforceable against him upon the grounds that the said rules are a restraint of trade and are wider than necessary in the interests of the Association and the applicant and the applicant and his fellow members and are contrary to the public interest.

(b) A declaration that the Ethics and Practice Empowering 1977 Regulation of the Association is void upon the grounds that the said regulation made by the General Council pursuant to ss 8(j) and 78(2) of the Association's Constitution is ultra vires the powers of delegation contained in the said sections.

THE ASSOCIATION AND ITS CONSTITUTION AND LEGISLATION

The Constitution

The Association was incorporated in 1973 under the provisions of the Incorporated Societies Act 1908. The supreme governing and policy-making body is the "General Council" which meets in ordinary session once only in any year on a date between May 31 and August 31.

The powers of the General Council (so far as they are relevant to these proceedings) are as set out in s 8:

" Powers - Without limiting the generality of section 7 of this Constitution (which defines the General Council as the supreme governing and policy-making body) the General Council shall have the power to do all or any of the following:

(g) suspend or expel any member of the Association or ratify such suspension or expulsion where such power is delegated to an officer of the Association;

(i) amend this Constitution;

(j) make Regulations for the proper government of the Association and to ensure the proper and adequate attainment of its aims and objects;

(k) delegate such powers as this Constitution permits to the Board of Directors or its members;

(l) create ad hoc bodies whether consisting of members or not. "

The executive and administrative functions of the Association are vested in a body of members known as the Board of Directors which is required to meet not less than once in every month.

The aims and objects of the Association as set out in Schedule 1 of the Constitution include:

" (b) To unite Life Underwriters in New Zealand into the general body of this Association, to improve and elevate the technical and general knowledge of members by lectures, examinations and other means furnished either by this Association or in co-operation with any kindred body qualified to assist in attaining this result; and to confer on members such titles and degrees as the Association may deem to be deserved.

(c) To raise the status and advance the interests of Life Underwriters.

(d) To represent generally the views and interests of the profession of Life Underwriting; to promote a public awareness of the value and importance to the community of the services of competent career life underwriters; and to stimulate and encourage a greater degree of proficiency in those so engaged.

(f) To uphold all laws and regulations in force from time to time governing the sale of Life Assurance, enacted by the Parliament of New Zealand; and to assist in every way possible in the enforcement of same.

(g) To devise and give effect to such measures as may from time to time be deemed necessary for the prevention of all practices considered by the Association to be detrimental to the interests of the public and the Life Assurance industry. "

The Code of Ethics of the Association is provided for in s 78. It provides:

" (1) At the first ordinary session of the General Council after the commencement of this Constitution, the General Council

shall cause to be drafted a Code of Ethics for the Association which shall be circulated to branches for comment.

(2) Subject to such alterations or additions as may be made, the General Council shall adopt the Code of Ethics and shall make a Regulation requiring each member of the Association to observe the Code in the course of conducting his own business affairs as a life underwriter or broker. "

The General Council in accordance with s 8(j) and with that section made a regulation known as the "Ethics and Practice Empowering 1977 Regulation" which came into force on 25 July 1977. A "regulation" is defined in s 3 of the Constitution as meaning:

" a directive of the General Council whether or not it contains matters of policy, executive directions, administrative directions or advice to members or grades of members. "

The Ethics and Practice Empowering 1977 Regulation provides:

(a) That the full Code of Ethics, including the professional guidelines, shall be binding on all members of the Association in the course of the conduct of their affairs as life underwriters.

(b) For the establishment of an Ethics and Practice (National) Committee as an ad hoc body under the direction of the Board of Directors.

(c) For the establishment of Ethics and Practice (Local) Committees to work under the National Committee.

(d) For the appointment by the Chairman of the National Committee of any "Committee-with-power-to-act".

(e) The "Committee-with-power-to-act" without further authority shall be competent to either -

Reprimand;

or, Fine up to $100;

or, Suspend for a specified period;

or, expel from membership

any member found guilty of an offence against the Association as set out in the regulation. Such an offence includes a breach of the Rules of the Code of Ethics.

The two codes of the Code of Ethics under which the applicant was charged are Codes 6 and 8 .

Code 6: "Replacement

A life underwriter shall not, directly or indirectly, replace or attempt to replace an existing contract issued by one office with a contract of another office. For this purpose replacement is defined as inducing or attempting to induce, directly or indirectly, an assured to:

(a) Lapse or cease premium payment on; or

(b) Forfeit or surrender for cash or for paid-up or extended assurance or other valuable consideration;

any individual policy of life assurance with one office in order to effect a contract with another office, except in cases of immigrants whose policies are with offices without representation in New Zealand and provided no loss will be suffered. "

Code 8: "Conservation and Policy Change Procedure

(A) A Life Underwriter shall, as a general rule, endeavour to maintain existing life assurance in force. However, the interests of a policyowner may dictate a change of specific life assurance from one type to another. In such a case the change shall be made, if possible, by the office which issued the original life assurance provided that the policyowner thereby is enabled to take advantage of any accumulated values and/or credits within the existing life assurance.

(B) Notwithstanding Code 6, if a policy-owner decides to cancel, lapse, forfeit, surrender for cash or make paid up or extended assurance or subject to substantial borrowing existing life assurance and apply

> for new life assurance in another office, the life underwriter shall advise, in writing, the head offices of the original office and the office in which he expects to place the new life assurance of the policyowner's intention and the reasons therefor. A copy of the letter to the original company shall be sent to the policy-owner.
>
> (C) If the procedure set out in paragraph (B) above has been followed and the life underwriter receives no direction from the policyowner to the contrary, within a period of 14 days following the date of his letter to the original office, he shall then be free to complete a proposal and to consider the new sale completed, subject to the provisions of Code 7. If the policy-owner, within that 14 day period, decides to retain the original life assurance, the new proposal shall be withdrawn or amended in accordance with the policy-owner's wishes.
>
> (D) Notwithstanding the fact that a policyowner may indicate in or as part of a proposal for new life insurance, that it is not his intention to replace existing life assurance, it is recognised that he does still have the right to replace existing life assurance. A pattern of such action by policyowners of the same life underwriter will, however, indicate that the life underwriter knew that replacement was intended and shall be deemed to be prima facie evidence that the life underwriter intended to violate the intent of Code 6.

THE APPLICANT'S CASE

The applicant advances his case on two bases:

First That Codes 6 and 8 impose a restraint of trade which is unreasonable and unenforceable.

Second That the Ethics and Practice Empowering 1977 Regulations are void as being ultra vires the powers of delegation given to the General Council by ss 8(j) and 78(2) of the Constitution.

Let me deal first with the restraint of trade argument.

RESTRAINT OF TRADE

It was submitted -

(a) That Code 6 imposes a prohibition on an underwriter replacing a policy held with one company with a policy to be issued by another company and that this prevents the underwriter from carrying out his legitimate business of placing insurance with companies to the client's best advantage where change to another company would produce such a result.

(b) That although Code 8 provides in clause (B) for replacement of insurance in another company - notwithstanding the prohibition in Code 6 - the clause requires the underwriter "to advise in writing the Head Office of the original office, and the office in which he expects to place the new life assurance, of the policyholder's intention and the reasons therefor". The obligation to give reasons, it was said, requires the underwriter to breach the equitable duty of confidence which exists between him and his client. This he can not lawfully do. In the result, the two codes impose upon the underwriter a restraint of trade which is unreasonable because:

(a) If he makes disclosure without the consent of the client he breaches the equitable duty of confidence and breaches Code Rules 1 and 3 which provide:

Code 1: "Priority of Policyowner Interests

A life underwriter shall place the interests of policyowners and prospective policyowner before his own and advise them to the best of his ability without bias and without regard for his own personal advantage. "

Code 3: "Confidential Information

A Life Underwriter shall respect the confidence of policyowners and prospective policyowner and hold in strict trust any information which becomes known to him regarding their personal and business affairs. "

(b) If he writes the policy without disclosure he breaches Codes 6 and 8.

(c) If he refuses to write the policy he may be in breach of Code Rule 1 (above).

THE ULTRA VIRES POINT

1. The General Council is vested with judicial powers by s 8(g) of the Constitution. It is given power to - "suspend or expel any member of the Association or ratify such suspension or expulsion where such power is delegated to an officer of the Association".

2. Section 8(j) and Section 78(2) under which the Regulations were made do not empower the General Council to delegate judicial powers to the Ethics and Practice (National) Committee as is done in Regulation 5, or for the Chairman of the National Committee to delegate that power to a "Committee with power to act" as is provided for in Regulation 8.

3. In the absence of power to delegate, the delegation of judicial functions was ultra vires the powers of the National Council and unlawful.

4. The "Committee-with-power-to-act" which was designated to hear the charges against the applicant has therefore no power to do so.

THE RESPONDENT'S CASE

The respondent's case is -

First (a) Codes 6 and 8 are prima facie a restraint of trade but are not wider than necessary in the interests of the respondent and the applicant and the applicant and his fellow members and are not contrary to the public interest.

(b) Alternatively, the doctrine of restraint of trade does not apply in this case as the respondent is a voluntary association, membership of which is

not a prerequisite to the carrying on of the business of life underwriting in New Zealand.

Second The Ethics and Practice Empowering 1977 Regulation is not ultra vires the powers contained in ss 8(j) and 78(2) of the Association Constitution and the delegation of disciplinary power to disciplinary bodies set up pursuant to the 1977 Regulation was not ultra vires the Constitution.

DECISION

THE RESTRAINT OF TRADE ARGUMENT

Mr White, counsel for the respondent, acknowledged that Codes 6 and 8 do impose a restraint of trade upon the applicant. Code 6 imposes what amounts almost to a complete prohibition of replacement of an existing policy with one taken out in a new company. But that prohibition is qualified by Code 8 to the extent that it allows an underwriter to effect replacement insurance if certain conditions are met, namely:

(a) He must advise in writing the head office of the original office and the office in which he expects to place the new life insurance of the policyholder's intentions and the reasons therefor.

(b) He must send a copy of the letter to the original company to the policyowner.

(c) He must wait for 14 days following the date of his letter to the original office to give the policyowner an opportunity to give any direction to the contrary.

If the above conditions are met, and if no direction is given to the contrary by the policyowner, then the underwriter is free to complete the new proposal and complete the new insurance.

The effect of Codes 6 and 8 therefore is to impose only a qualified restraint of trade. It is a restraint which does not operate so long as the specified conditions are met.

Mr Ivory, however, did not accept that such was the case. There is, he says, a duty of confidence imposed upon an underwriter which prevents him from complying with Condition (a) referred to above, namely, the requirement of Code 8 that he advise the two insurance offices of the policy-holder's intentions and the reasons therefor.

The duty of confidence, it is said, may arise in three ways by reason of:

(a) The equitable duty imposed by law.

(b) The duty imposed on underwriters by the rules of the Association.

(c) The duty imposed on underwriters by employing companies.

Mr Ivory placed considerable reliance upon his submission that there exists an equitable duty of confidence between the underwriter and his client - the insured. The extent of that duty was not, however, clearly spelt out.

There can be little doubt that in appropriate cases the Courts will imply a duty of confidence in connection with information obtained as a result of relationships between parties. This duty may impliedly arise out of contract: Parry-Jones v Law Society [1969] 1 Ch 1 at p 7; or it may arise independently of contract and amount to a purely equitable obligation: Attorney-General v Jonathan Cape [1975] 3 WLR 606; Duchess of Argyll v Duke of Argyll [1967] 1 Ch 302, 322.

The relationship between obligations arising out of an implied contractual duty and those arising in equity is not clear. Finn in his book Fiduciary Obligations discusses the matter at p 133. He says:

> " But the acceptance of a rule of Equity outside of contract raises its own difficulties. Are the considerations which call into existence the equitable duty of confidence

> the same type of considerations as those which give rise to the implied contractual duty of confidence? Are the two duties mutually exclusive or do they overlap? Does one or other of the duties provide a discloser with a wider range of remedies against his misbehaving confidant? "

In discussing the types of relationships which give rise to a duty of confidence implied in the contract Finn says at p 137:

> " In Parry-Jones v Law Society Lord Denning commented on the 'professional man-client' relationship:
>
> > The law implies a term into the contract whereby a professional man is to keep his client's affairs secret and not to disclose them to anyone without just cause.
>
> Doctors, accountants, solicitors, bankers and counsel have long been held to be in this class. Who else may qualify as a 'professional man' is very much an open question. Are the 'affairs of the client' which a dentist or a social worker ascertains by virtue of their respective employments such that they must be kept shrouded by the professional man's duty of secrecy? No guidance is forthcoming from the cases.
>
> Even if a person in a particular occupation finds himself elevated to the ranks of the law's 'professional men' he will find no ready rule which indicates the scope of his duty of secrecy. In Tournier v National Provincial & Union Bank of England, a banker-customer case, Bankes L.J. commented that -
>
> > The privilege of non-disclosure to which a client or customer is entitled may vary according to the exact nature of the relationship between the client or the customer and the person on whom the duty rests. It need not be the same in the case of the counsel, the solicitor, the doctor, and the banker, though the underlying principle may be the same.
>
> In the same case Atkin L.J. observed that '[i]t is difficult to hit upon a formula which will define the maximum of the obligation which must necessarily be implied'; and that '[t]he limitation of the implied term must vary with the special circumstances peculiar to each class of occupation.'

> It would seem, though, that the courts are prepared to give the duty of secrecy a very generous operation indeed, over the entire field of communications made by the client or of information acquired about the client in the course of a professional relationship. "

In discussing the nature and extent of the duty of secrecy, Finn says at p 139:

> " Apart from indicating that the limits to the duty of secrecy must depend upon the special circumstances peculiar to each occupation, the courts have left this area of the law shrouded largely in mystery. It has been said that in the case of solicitors the courts will exact a very high standard of behaviour in matters of confidence. A similar standard most likely would be expected of doctors for their duty of secrecy serves not only to protect the patients' disclosures, but is also a screen behind which open and uninhibited communications are to be encouraged. And of other professional men? The cases are silent.
>
> At the moment the only safe course for a professional man would seem to be that he does not divulge any information that he has acquired about his client during the currency of the relationship unless there is some lawful excuse for his doing so. "

The relationship between underwriter and policy-owner is one that in my opinion gives rise to an implied obligation of confidence, but what limits should the Court impose on that obligation? Any duty of confidence existing between underwriter and policyowner must arise out of the nature of the association between them. The underwriter may in the course of his discussions for the purpose of advising and of preparing a proposal for insurance receive information relating to personal or business affairs. It is that type of information which is referred to in Code 3 of the Association's Code of Ethics.
Code 3 provides:

> " A life underwriter shall respect the confidence of policyowners and prospective policyowner and hold in strict trust any information which becomes known to him regarding their personal and business affairs. "

The guideline to that Code states:

> " In the course of his work a life underwriter must obtain extensive information concerning the personal and financial affairs of his policyowners and prospects. This places the life underwriter in a position of trust and responsibility. It is completely unethical to betray this trust in any respect.
>
> Consequently, if the life underwriter believes it would be in the interests of the policyowner or prospect to discuss his affairs with any other person, he must first secure the policyowner's or prospect's permission to do so, preferably in writing. "

I do not accept Mr Ivory's submission that the duty of confidence in this case is an equitable one. It arises by implication from the nature of the contractual relationship between the parties - the relationship of underwriter and client. For the purposes of this case, the obligation appears to me to be that which is spelt out in Code 3 of the Association's Code of Ethics. The Code simply recites the obligation which the law will imply and makes the observance of that duty of confidence binding on the underwriter. So that for a breach of that Code he may be proceeded against under the disciplinary rules of the Association.

Mr Ivory next argued that the duty of confidence prevented the applicant from complying with the requirements of Code 8 by giving to the head office of the original office and the office in which he expects to place the new life assurance "the policyowner's intention and the reasons therefor".

There are, he said, only four justifications for disclosure of confidential information. They are:

(a) Disclosure under compulsion of law.

(b) Where the recipient of the information is acting in his interests to protect himself from the disclosure.

(c) Disclosure by reason of public duty.

(d) Disclosure with consent of the giver of the information.

The circumstances (a) and (b) do not apply to the argument in the present case. However, it is said that (a) if the applicant makes disclosure without consent, he breaches the duty of confidence:

(b) if he writes the policy without disclosure, he breaches Codes 1 and 3:

(c) if he refuses to write the policy, he may be in breach of Code 1.

The Association answers the applicant's argument founded on the alleged restrictive effects of the duty of confidentiality and Codes 6 and 8 in four main submissions made by Mr White.

1. The duty as referred to in Code 3 relates only to the "personal and business affairs" of the policyowner. The policyowner's "intentions and the reasons therefor" will seldom fall within the categories of "personal and business affairs". If such situation does arise, however, then the underwriter's first obligation under Code 3 is to obtain the policyowner's permission to make the disclosure and in the majority of cases one could expect that consent to be given. If the policyowner refuses consent then the underwriter can still advise of the policyowner's intention to replace the existing policy with a new one even though he may not be able to give the policyowner's reasons therefor.

The simple giving of notice of intention can hardly constitute a breach of confidence because it is simply a statement of fact which must have already been agreed to by the policyowner otherwise there would be no point in the underwriter proceeding further.

If the policyowner declines to consent to the underwriter giving reasons then the underwriter can merely give notice of intention to the companies and say that the policyowner declines to permit the reasons to be given.

The underwriter in such circumstances could not be held to be in breach of Code 8. He would then be in the position of acting for a policyowner who wanted to replace his policy and intended to do so but refused to allow his reasons to be disclosed.

The advice of the policyowner's intentions would be sufficient to warn the original company of the proposed change and enable it to interview the policyowner to see whether he really did wish to change. It would also enable the new Life Office to consider the matter and take whatever steps are thought necessary.

The significant matter is, however, that compliance with the duty of confidentiality does not restrict the underwriter in trading as alleged by the applicant.

2. Codes 6 and 8 do not impose an unreasonable restraint of trade upon the applicant.

3. The ordinary principles of restraint of trade do not apply where restraints exist as part of a code of professional conduct.

4. The doctrine of restraint of trade does not apply to the present case where the Association is a voluntary one, membership of which is not a prerequisite to the carrying on of the business of life underwriting in New Zealand.

I agree with the four submissions on behalf of the Association.

1. As to Confidentiality: For the reasons set out by Mr White, I accept that the observance of the duty of confidentiality imposed upon the applicant does not prevent him from selling a replacement insurance policy or cause him to act in breach of Codes 6 and 8.

2. Codes 6 and 8 do not impose an unreasonable restraint of trade upon the applicant because the Codes which are imposed substantially for the benefit of the public are not unduly oppressive to or obviously detrimental to the public.

The purpose of Code 6 as stated in the Code is to prevent a policyowner suffering loss if life assurance with permanent assurance values is cancelled or changed in favour of life assurance with another office.

The purpose of Code 8 is stated to be that whenever it appears to be in the best interests of a policyowner to change the terms or plan of an existing life insurance contract the office which issued the original contract should have reasonable opportunity to make the changes provided that the policyowner can be given maximum credit for existing values and policy conditions.

The test to be applied was expressed by Tindal C.J. in Horner v Graves 7 Bing, 743 and approved by the Privy Council in Collins v Locke (1879) 4 AC 674, 686:

> " We do not see how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. "

See, too, Buckley v Tutty (1971) 125 CLR 353.

The restraint, if there be one, imposed by the Association rules simply requires members to comply with certain principles for the benefit of the public with whom those members deal. Such restraints are related to the objects of the Association and are necessary in the interests of members. They are not unreasonable.

3. The ordinary principles of restraint of trade do not apply to restraints existing as part of a Code of professional conduct.

In Dickson v Pharmaceutical Society [1970] AC 403 Lord Reid said at p 421:

> " The respondent argues that, as this motion would operate in restraint of trade, the ordinary principles of

> restraint of trade apply so that the appellants must plead and prove justification. I am very doubtful whether that is so where restraints exist as part of a code of professional conduct. If the ordinary rule were to apply, any member of a profession who wanted to make more money by disregarding some long-standing rule of professional conduct could require the restraint to be justified without himself having to allege and prove that the rule was unreasonable. The onus would be on the body defending the standards of the profession and, unless the tests laid down in the authorities are to be altered, I do not see how the court could limit the extent to which it would interfere in the domestic affairs of the profession. On the general question of the ordinary rules of restraint of trade I may be permitted to refer to what I said in Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1968] A.C. 269, 293 et seq. But I do not think it necessary to pursue this matter because, wherever the onus may lie in this case, I am of opinion that these restraints cannot reasonably be related to the objects of the society. "

For myself, I find it difficult to accept that where a professional association as one of its objects has provided a code of ethics for the control of the conduct of its members, that one of those members can come to the Court and complain that one or more of the rules of that code are an unreasonable restraint of trade and are unenforceable or illegal or void, whatever expression one may choose to use: see Buckley v Tutty (ante) at p 379.

4. The applicant has chosen to belong to the Association. His membership is not a prerequisite to his right to operate as an underwriter and sell life insurance. In fact the evidence shows only approximately half of the underwriters practising in New Zealand belong to the Association.

It is of the essence of the doctrine of restraint of trade that the restraint must be "unreasonable": Buckley v Tutty (ante). I do not find it unreasonable that the

applicant, if he chooses to belong to the Association, should abide by its rules, but if he does not choose to do so then that he should cease to be a member of the Association, in which event he can carry on his business as an underwriter unhindered by any restrictions or restraints which the Association rules may impose.

Blackler v New Zealand Rugby Football League (Inc) [1968] NZLR 547; Pharmaceutical Society of Great Britain v Dickson (ante) and Buckley v Tutty (ante) which were referred to in argument were all cases where membership of an association or society was a prerequisite to the carrying on of the relevant activity. The various alleged restraints of trade affected members' livelihoods.

I know of no case where the doctrine of restraint of trade has been applied to voluntary membership of an association where a member can leave that association and his livelihood be not affected and I would be very hesitant to extend the doctrine into such area.

The applicant's arguments based on restraint of trade fail.

THE ULTRA VIRES ARGUMENT

The applicant in his statement of claim pleads:

> "9. The said 1977 Regulation is ultra vires the powers of delegation contained in the said Sections 8(j) and 78(2)" (of the Constitution).

That allegation is meaningless because Sections 8(j) and 78(2) contain no powers of delegation at all. The applicant's case, however, proceeded on the basis that the General Council of the Association purported to delegate to a Committee (by virtue of the 1977 Regulations) a power given to the Council by s 8(g) which only the Council could exercise. Section 8(g) provides:

> "8. Powers - Without limiting the generality of section 7 of this Constitution, the General Council shall have the power to do all or any of the following:

> (g) suspend or expel any member of the Association or ratify such suspension or expulsion where such power is delegated to an officer of the Association. "

The applicant relied on Barnard v National Dock Labour Board [1953] 2 QB 18 and Vine v National Dock Labour Board [1957] A.C.488. But the General Council did not in my judgment delegate to a Committee the powers given it by s 8(g) of the Constitution. What the General Council did was to act pursuant to s 8(j) and to make regulations for the purpose stated in s 8(j) namely -

> " for the proper government of the Association and to ensure the proper and adequate attainment of its aims and objects. "

"The proper government of the Association" required the setting up of an effective disciplinary system and "the proper and adequate attainment of its aims and objects" required the formulation of a code of ethics and the establishment of a disciplinary body to enforce that code. "Aims and objects" of the Association relevant to the establishment of such a disciplinary body are as set out in clause 3 :

> "(c) To raise the status and advance the interests of Life Underwriters.
>
> (g) To devise and give effect to such measures as may from time to time be deemed necessary for the prevention of all practices considered by the Association to be detrimental to the interests of the public and the Life Assurance industry. "

The authority of the "Committee-with-power-to-act" did not derive from delegation to it by the General Council pursuant to s 8(g) of the Constitution but from the Regulations authorised and properly made by the General Council pursuant to s 8(j).

What are the circumstances under which the General Council may act under s 8(g) and suspend or expel any member

or ratify any suspension or expulsion where such power is delegated to an officer of the Association are not spelt out and are certainly not clear. The General Committee meets only once a year and no procedures are spelt out leading up to suspension or expulsion of a member. Furthermore, there is no obligation imposed upon the General Council to exercise that power to suspend or expel. As the "supreme governing authority" of the Association (see s 7) it can elect to exercise that power or not as it chooses.

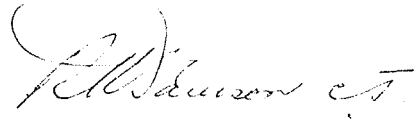
The power given to the Committee under the Regulations is wider than that conferred upon the General Council by s 8(g). The General Council's power is only to suspend or expel. The regulations made under the authority of s 8(j) give the Committee power to reprimand, fine, suspend or expel, and provide appropriate procedures for disciplinary proceedings and for rights of appeal.

If the source of the Committee's power was to be by delegation of the powers of the General Council given it by s 8(g) then the Council could only delegate to the Committee the powers to "suspend or expel" as those are the only powers the Council has under that section. It is clear therefore that the General Council did not consider it was delegating its powers under s 8(g), but rather it invested the Committee with separate powers pursuant to s 8(j).

The applicant's argument based on ultra vires fails.

CONCLUSION

In the result, the application fails and is dismissed. The respondent Association is entitled to costs. Counsel may submit memoranda as to quantum for consideration.



Solicitor for the Applicant F.A.Jew (Auckland)
Solicitors for the Respondent Young Swan Morison McKay (Wellington)