

Carol Aitken

From: Anna Colban
Sent: 15 April 2008 00:30
To: Carol Aitken
Subject: FW: Scheme Review

Carol

A consultation response.

Hope all is well there.

regards

Anna

From: Patrick Lawrence [mailto:P.Lawrence@4newsquare.com]
Sent: Mon 4/14/2008 3:11 PM
To: Anna Colban
Subject: Scheme Review

Dear Anna

I hope that you will excuse a response to the consultation that is relatively informal as well as being a day late!

I agree with most of the proposed changes to the Scheme, and would only comment on two matters.

Question 5: the Desirability Criteria

I expect one relevant criterion will be the seriousness of the allegation in question.

Clause 7(11) of the draft amended Scheme contemplates that the DDC might, having had regard to these criteria, take a 'blue pencil' to the Complaint, striking out some allegations but leaving others in. One can see that a case might arise in which Executive Counsel formulates a Complaint which contains, say, five separate 'charges'. Of these five charges, three might concern matters that were obviously of a most serious nature. The fourth and fifth charges might, though less serious, be included because they are related to the three most serious charges; and because the effective presentation/investigation of the case against the Member makes it desirable that the five charges be heard together.

It seems to me that it would be unfortunate if it were open to the Member whose conduct is being examined to say "the DDC must rule that charges 4 and 5 cannot be proceeded with, because they are insufficiently serious and therefore fall outside the scope of the Desirability Criteria".

One way to deal with this would be to include in the Desirability Criteria a criterion that read something like this: "Whether it is desirable that a particular matter be the subject of formal complaint, even if not itself satisfying the 'seriousness criterion', having regard to its connection with other matters complained of."

Question 7: costs

21/04/2008

I think that paragraph 8(9) in the draft amended Scheme may need to be reconsidered.

I can certainly see the force in the argument that the Tribunal's discretion to make an order for costs in favour of Members and Member Firms should be narrowly confined in order to avoid the regulator from being deterred by the threat of huge costs orders from advancing complaints that ought to be advanced in the public interest. I would note in this respect that the very substantial costs liabilities in the *Mayflower* case might well be exceeded in future cases. It is inherent in the nature of JDS/AIDB/AADB proceedings that they tend to be hard-fought, document-heavy, lengthy and generally very expensive.

It is also relevant to take into account the fact that in many cases (I would guess the vast majority) the Member Firm whose conduct is impugned will be a substantial entity with PI insurance covering its legal costs.

So: in principle, I agree with a limitation being placed on the discretion to make an order for costs against the AADB (or Executive Counsel).

However, as 8(9) is presently drafted, I foresee uncertainty and disputation. 'Misfeasance' is not defined in the Definitions section. If it is to be construed as bearing the meaning ascribed to it in 6.38 of the paper, then it is very difficult to conceive of circumstances in which a successful respondent would be able to demonstrate misfeasance. How could one demonstrate that Executive Counsel 'intended to cause harm'? In what circumstances could it be said that Executive Counsel was aware of or was recklessly indifferent as to the illegality of an act? What sort of illegality is contemplated here?

It might be open to a successful respondent to argue: "Misfeasance cannot bear the meaning the Executive Counsel places on it, because if it did then the purported discretion to award costs in favour of a respondent is a dead letter, in the sense that it is almost inconceivable that the discretion could ever be exercised. The term 'misfeasance' must therefore be construed more generously ..." Arguments of this nature might be supported by reference to Article 6, the 'equality of arms' principle, etc.

I would suggest that the conditions that have to be satisfied if there is to be any discretion to make an order for costs against the AADB / Executive Counsel should be spelt out in terms, and not by using an internally undefined term such as 'misfeasance'. If it is intended that the discretion should exist only if executive counsel (or those acting for him) has in some sense been guilty of impropriety or bad faith, then that should be made clear.

I would make one further point in relation to the costs issue. As the present paragraph 8(9) stands, it is unclear whether the discretion to award costs where 'misfeasance' has occurred is limited to costs that were incurred as a result of the acts or omissions constituting misfeasance. It might be argued that the paragraph is to be read as being intended to have a deterrent effect, in that any misfeasance (however peripheral to the course of the complaint) on the part of Executive Counsel or the DDC or counsel or investigating expert accountant brings into existence an unfettered discretion to make an order in relation to any costs incurred by a Member. If it is intended that the discretion should be limited to costs incurred as a result of the misfeasance (or such other conduct on the part of Executive Counsel etc as brings the discretion into existence), then that should be stated in terms.

Yours ever

Patrick

PATRICK LAWRENCE QC

21/04/2008

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