The Queen on the application of Senior-Milne

v

The Institute of Chartered Accountants in England & Wales

(CO/11766/2010)

Arguments for the renewal hearing on 2/3/2010

Introduction

1. This is a hearing to consider the renewal of an application for a judicial review which was initially rejected on the papers on 7/1/2011.
2. The application arose from a refusal by the Institute of Chartered Accountants in England & Wales (or ICAEW) to properly assess, in accordance with their own complaints procedures, a complaint that I made to them in July 2010.
3. I made this complaint as a member of the ICAEW and in accordance with Disciplinary Bye-law 9(1) which requires members to report to the Head of Staff, where it is in the public interest to do so, any facts or matters which indicate that a member, including a member firm, may be liable to disciplinary action.
4. The objective of my application for judicial review is to obtain from the court an order ordering the ICAEW to assess my complaint in accordance with its own complaints procedures.
5. The ICAEW opposed my application on the grounds that:
   5.1. my complaint was a repetition of an earlier complaint made in 2007;
   5.2. that an application for judicial review of that earlier complaint was now outside the 3 month time limit for applying for a judicial review;
   5.3. that there were no new grounds for re-opening the earlier complaint.
6. The court agreed with these arguments.

The need for context

7. I believe that the objective of this court in this case is to do justice as far as it can within the law. I do not believe that it is possible to do justice in this case without understanding the context in which my complaint was made.
8. My complaint that the ICAEW failed to follow its own complaints procedures sounds like a matter of small moment but the issue that is at stake is a critical one, as I shall now explain.
9. In my application I stated my belief that the real reason for the ICAEW's refusal to investigate my complaint was that they did not want to start an investigation which they knew would lead to the exposure of very serious failings in audits carried out by some of the UK's biggest accounting firms.
10. When I say 'very serious failings' I am referring to the fact that, as I explain later, the total losses which I believe were actively concealed by the auditors concerned amounted to £14 billion at the relevant time and are now estimated to amount to over £40 billion, based on newspaper articles and figures provided by the Equitable Members Action group.
11. My view is that these failures were not just individual failings but that they are evidence of a wholesale and systemic failure in the audit process which has been getting progressively worse over at least the last 20 years. And the reason it has been getting worse is because of an almost complete failure of the audit profession to regulate itself. In other words, I am saying that while these losses of £40 billion are obviously very serious they are not the most important issue in this case – not by a long way.

12. So who is this self-regulator? The ICAEW. In other words, the ICAEW is refusing to investigate my complaint because they know that it will expose their own failure to properly regulate the auditing profession. That is the real reason behind their conduct.
13. Is this really a believable explanation? Could there really have been a 'wholesale and systemic failure' for over 20 years? Has the auditing profession really failed to regulate itself?

The banking crisis

14. I would argue not only that there was a wholesale and systemic failure at the relevant time, which was centred on the period 1998 to 2000, but that this systemic failure has continued to the present day and was one of the causes, indeed the main cause in my view, of the banking crisis.
15. So how can auditors and professional bodies like the ICAEW be responsible for the banking crisis?
16. Well, let me pose some short questions:
    16.1. Firstly, would the banking crisis have happened if the relevant parties (investors, regulators and so on) had been fully informed of the true situation in a timely manner? Answer? Clearly not because those parties would have then been able to take appropriate action.
    16.2. Next question. What is the main mechanism by which investors and regulators are informed of the financial performance and position of the banks? Answer? Annual accounts.
    16.3. Next question. Who is responsible for reporting on whether these accounts show a true and fair view? Answer? The auditors.
    16.4. Next question. Who is responsible for implementing and running the regulatory regime which is designed to ensure that auditors do their job properly? Answer? Well, in the UK it is the ICAEW and associated bodies.
17. It is therefore clear that the banking crisis was primarily a failure of information and that this failure can be laid squarely at the feet of the auditing profession.
18. But it is not just me who is saying this. Professor Hernando de Soto*, said by Time magazine to be one of the 100 most influential people in the world, said in his speech at the inaugural Zermatt Summit in June 2001 that:

    'I believe this is the real reason for the developed world's financial crisis. It is an epistemological problem, a problem of knowledge—of no longer having facts to rely on.'

    He goes on to say:

    'Suddenly, banks were able to publish financial statements that bore no resemblance to reality. The net result is that we ended up with a fantasy economy that is detached from economic reality.'

    *President of the Institute for Liberty and Democracy - headquartered in Lima, Peru - considered by The Economist as one of the two most important think tanks in the world. Time magazine

chose him as one of the five leading Latin American innovators of the century in its special May 1999 issue "Leaders for the New Millennium", and included him among the 100 most influential people in the world in 2004. In its 85th anniversary edition, Forbes named Mr. de Soto as one of 15 innovators “who will reinvent your future”. (http://www.gicdf.org/index.php?option=com_content&view=article&id=361&Itemid=77)

19. In addition, I would like to quote from an interview given by Charles Munger, Vice-Chairman of Berkshire Hathaway, who I believe is now in his 80s, who is a partner of Warren Buffet and one of the most successful financiers in America, in an interview with the Law School of Stanford University, as follows:

    - Interviewer: *Charlie, you have complained that accountants are the root of much evil and also even more folly. As we look at the current situation we have in our financial markets, how much of the responsibility would you lay at the feet of the accounting profession?*
    - Munger: *Well, here I am a voice in the wilderness but I would argue that the majority of the horrors we face would not have happened if the accounting profession were organised properly. In other words, they have a position from which, if they behaved intelligently and correctly, they could prevent a huge amount of all that’s wrong with the system - and they failed utterly time after time after time. And they are way too liberal in providing the kind of accounting financial promoters want.*
    - Interviewer: *So, in other words?*
    - Munger: *They sold out. And they do not even realise that they have sold out, which of course is a common human psychological phenomenon. You squelch by denial what you recognize what would make you think ill of yourself or would interfere with your income. So on a subconscious level, without any malevolence, the accounting profession are behaving in a way that makes – well, compared to what could reasonably be with intelligence and honour the accounting profession is a sewer.*
    - Interviewer: *Could you give an example of a particular accounting principle that you think…*
    - Munger: *Take derivative trading with mark to market accounting, which degenerates into mark to model. Two firms make a big derivative trade – and the accountants on both sides show a large profit from the same trade.*
    - Interviewer: *And they can’t both be right.*
    - Munger: *And they can’t both be right.*
    - Interviewer: And *both of them are following the rules to a T.*
    - Munger: *Yes, and nobody is even bothered by the fact that this is happening. It violates the most elemental principles of common sense and the reason they do it is there is a demand for it from the financial promoters. I remember when interest rate swap accounting was done on a different basis and the Morgan Bank was the last to hold out and finally they couldn’t hold their traders and report the same kind of income other people were reporting so they threw out the sound accounting and went to the phoney accounting. It was kind of funny at the time – it was many*

decades ago. The board were kind of reluctant but they said we just have to go with the flow. It was a huge mistake.

- Interviewer: *Is this a problem that can be fixed with the accounting profession or are we just going to have to live with it?*
- Munger: *I think you are talking about a problem rooted so deeply in human nature that I don't think you'll live long enough. If it get s 20% fixed in the direction it should go in your remaining lifetime you'll be a fortunate man.*
- Interviewer: *So how do we get there? So let's assume that we actually want to accomplish something…*
- Munger: *I don't know how to transform all human life.*
- Interviewer: (Laughs) *We're just talking about the accounting here Charlie!*
- Munger: *Accounting is a big subject and there are huge forces in play and the entire momentum of existing thinking, of existing custom, is in the direction which allows these terrible follies to happen – and the terrible follies have terrible consequences. What we're in now, in its triggering circumstances, is worse than anything that's ever happened.*
- Interviewer: *Worse than the Great Depression?*
- Munger: *Yes. The economy hasn't contracted as much as the Great Depression but the malfeasance and silliness, which was the triggering event, was way greater.*

20. Moving on from that interview, in a discussion paper of June 2010 (http://www.fsa.gov.uk/pubs/discussion/dp10_03.pdf) the Financial Services Authority referred to a *'worrying lack of scepticism'* amongst auditors and FSA director Paul Sharma said in a statement that *'Our experience has indicated that, at times, auditors have focused too much on gathering and accepting evidence to support firms' assertions, rather than exercising sufficient professional scepticism in their approach. This falls far short of what the FSA—and society at large—expects from auditors.'*
21. Not that long ago the FSA was described by its own Chairman as being *'not fit for purpose'* and the Parliamentary Ombudsman, in her report on the Equitable Life crisis, found that the FSA had *'actively misled'* policyholders and was guilty of *'serial regulatory failure'* – so when the FSA starts criticising auditors we know something is seriously wrong.
22. I would also note that, following the collapse of Enron, the ICAEW decided not to carry out any investigation into the conduct of one of its members, Lord Wakeham, who was a non-executive director of Enron. One is tempted to ask *'If the ICAEW will not investigate the conduct of one of its members who was a key player in the collapse of Enron, what will it investigate?'*
23. The picture we are building is a clear one. It is of a profession and its professional body who have failed utterly, for many years, in their duty to 'society a large' and who, in the aftermath of the banking crisis, are, frankly, in a state of outright denial. It is this state of denial that explains the ICAEW's response to my complaint.
24. Finally, I would like to note the acceptance speech made by the film director, Charles Ferguson, three days ago when he accepted an Oscar for 'Best documentary' for his film 'Inside Job', an exposé of the greed which lead to the banking crisis. He started his speech as follows:

    "Forgive me, I must start by pointing out that three years after our horrific financial crisis caused by financial fraud, not a single financial executive has gone to jail, and that's wrong."

and later

"Unfortunately, I think that the reason is predominantly that the financial industry has become so politically powerful that it is able to inhibit the normal process of justice and law enforcement."

25. Remember, this was said three days ago.
26. I am not here to try and solve the problem of greed and corruption amongst bankers, except that I can say with confidence that they would not have even attempted to do what they did had they been aware that there was a robust financial reporting system in place, robustly regulated, which would have exposed their conduct by the simple expedient of reporting the truth.
27. In all honesty I can say that if we do not address the question of the lack of integrity at the heart of the accounting profession and the consequent failure of self-regulation then we will leave ourselves open to a repetition of the banking crisis. It's as simple as that. And that is what is at the heart of this case.
28. Having put my complaint in context I would like to proceed with the history of my complaint.

The Equitable Life crisis

29. My complaint to the ICAEW had its origins in the Equitable Life crisis of 2000. In that year Equitable Life collapsed as a result of a £1.5 billion 'black hole' in its finances arising from the sale of Guaranteed Annuity Rate (or GAR) policies. Equitable Life had been selling these policies since the late 1950s, as had other life companies, but things went 'pear-shaped' in the late 1990s as long term interest rates fell and the company found itself liable to fund the gap between the annuity rates it had guaranteed and the annuity rates it could obtain in the market.
30. Equitable Life wanted to address the problem by reducing terminal bonuses to GAR policyholders but needed the sanction of the court to ensure that they could do this. This led to a test case which started in the High Court in January 1999. The High Court ruled in favour of Equitable Life in September 1999 and the matter was appealed to the Court of Appeal. In February 2000 the Court of Appeal reversed the High Court ruling (i.e. it ruled that Equitable Life could not pay reduced terminal bonuses to GAR policyholders) and this ruling was upheld by the House of Lords in July 2000. This ruling led to the immediate collapse of Equitable Life.
31. The collapse of Equitable Life involved a very large sum of money and caused loss and hardship to millions of people. This naturally led to a number of official and other enquiries into the causes of the collapse and the role played by the various parties. There were 12 enquires in all and these included an investigation by the Parliamentary Ombudsman into the part played by the regulator (the Financial Services Authority or FSA), an investigation by the Faculty and Institute of Actuaries into the conduct of actuaries involved in the crisis and an investigation by the ICAEW into the conduct of Equitable Life's auditors, Ernst & Young, who had failed to qualify Equitable Life's accounts in respect of the £1.5 billion GAR liability.
32. It was not until 2010 that the last of these investigations was concluded and it was only in that year that the government apologised to the Equitable Life policyholders and announced the

setting up of a compensation scheme. So the reverberations of the Equitable Life crisis are still being felt today.

33. Before I continue I would like to make a number of points about the Equitable Life crisis that are relevant to this hearing:
    33.1. Equitable Life was not the only life company who sold GAR policies; all the other major life companies had done so as well;
    33.2. Some of these companies had worse GAR problems than Equitable Life but Equitable Life 'hit the buffers first' because it had an over generous bonus policy that meant that it was less able to weather adverse financial conditions (the fall in long-term interest rates in this case);
    33.3. We know from the government's Penrose Report that the GAR issue had become an 'industry-wide issue' by November 1997.
    33.4. We know that the FSA was monitoring the GAR position of the life companies on a regular basis.
    33.5. We know from the Parliamentary Ombudsman's report that, at this time, eight life companies gave 'general cause for concern' and that two, including Equitable Life, were of 'particular concern'.
    33.6. In comparison to Equitable Life's £1.5 billion GAR problem it was estimated in July 2000 that the total GAR liabilities of the UK life industry at that time were around £14 billion.
    33.7. In late 2010 The Equitable Members' Action Group estimated that the total loss the Equitable Life policyholders was now over £4 billion; in other words, if these policyholders had had their £1.5 billion invested elsewhere they would now be £4 billion better off than they are now.
    33.8. On this basis the overall loss to policyholders of all the life companies of £14 billion has now grown to £40 billion;
    33.9. In summary, the Equitable Life crisis was just the tip of an iceberg.

The Scottish Widows demutualisation

34. In 1998 I joined Lloyds TSB as an audit manager based at their head office in London. Lloyds TSB took over Scottish Widows in 2000 and I joined Scottish Widows as an audit manager in their head office in 2002, following a heart attack in 2001.
35. Lloyds TSB purchased Scottish Widows from its policyholders in March 2000. This is referred to as the Scottish Widows demutualisation because the company ceased to be a mutual company owned by its policyholders and became a subsidiary of the bank.
36. The purchase price was £6 billion, of which £4.5 billion was paid in cash and £1.5 billion was retained in an 'Additional Account'. The circular which was sent to policyholders in November 1999 seeking approval of the sale said that the balance on the Additional Account would be distributed to policyholders over time as terminal bonus i.e. when people's policies matured.
37. Critically, although the circular did mention GAR liabilities it did not mention the Equitable Life case, which was then before the Court of Appeal, and there was no assessment in the circular about the possible or likely outcome of the case or the possible or likely effect on policyholders, which, in a worst case scenario, was that they would not see a penny of the £1.5 billion retained

in the 'Additional Account'. Such matters should have been disclosed under generally accepted accounting principles (GAAP), principally Financial Reporting Standard 12, which covers contingent liabilities.

38. Essentially then the policyholders approved the demutualisation on the basis of incomplete and misleading information because at no time were they informed of the size and nature of the GAR problem in any set of accounts or the demutualisation circular.
39. These omissions from the policyholder circular were quite clearly deliberate and there can be no question that the directors of Scottish Widows not only knew of the potential consequences of the Equitable Life case but that they also knew that they had a duty, both legal and under generally accepted accounting principles, to properly (and that is the key word) disclose this matter.
40. Not to put too fine a point on it, the policyholders were diddled out of £1.5 billion by a sleight of hand by both the Directors of Scottish Widows and the Directors of Lloyds TSB, who were also fully aware of what was happening. Indeed, I believe that the demutualisation scheme was devised precisely to prevent the possible collapse of Scottish Widows a la Equitable Life and I believe that Lloyds TSB acted as a 'white knight' to rescue Scottish Widows at the behest of the government, and with the connivance of the FSA, in exactly the same was that it was to do with HBOS some years later.
41. Furthermore, the Court of Appeal ruled against Equitable Life on 22 January 2000 but the consequences of the ruling were not disclosed to the Court of Session prior to its approval of the demutualisation scheme on 28 February 2000, one month later. There can be no doubt that this failure by the Directors of Scottish Widows to disclose this critical matter was deliberate (since they must have been fully aware of its significance) and that, as I found out later, it amounted to a criminal offence under s.71 Insurance Companies Act 1982 and s.19 Theft Act 1968.
42. Of course, this cover up by the Directors of Scottish Widows could not have occurred without the active participation of the auditors, PricewaterhouseCoopers (PwC). In this context, it is important to realize that the GAR problem had become, as I stated in my application and as acknowledged in the Penrose Report, an 'industry-wide issue' by November 1997. It is therefore inconceivable that PwC did not know of the Scottish Widows GAR problems when they signed off that company's 1998 and 1999 accounts. And by the time they signed off the 1999 accounts of Scottish Widows on 16 February 2000 the GAR liability had become and actual, as opposed to contingent, liability as a result of the Appeal Court ruling in the Equitable Life case on 22 January 2000. And of course, we now know that the ICAEW's investigation into Ernst & Young's conduct as auditors of Equitable Life, which finally reported in 2010 and which led to complaint which forms the basis of my application for judicial review, concluded that Ernst & Young should have qualified the 1998 accounts of Scottish Widows in respect of GAR liabilities in the absence of legal advice to the contrary – and it is quite clear that PwC should have done the same with respect to the 1998 accounts of Scottish Widows because both companies were in the same situation with respect to GAR liabilities. Their situations were identical.

Whistleblowing

43. When I joined Scottish Widows in January 2002 I knew nothing of this, of course, and it was only during the course of that year that I became concerned that policyholders may not have been fully informed of the GAR situation before the demutualisation.
44. It was not until, I think, October 2002 that I sought the advice of the Ethical Advisory Service of the ICAEW. They advised me to report my concerns to the auditors, PwC, which I did on 11 November 2002, in spite of my reservations, which I voiced at the time, about reporting my concerns to a party who had quite clearly been a party to the cover up.
45. To cut a long story short, a month later I was suspended on the basis of 31 allegations of misconduct, drafted by my own manager, many of which were either patently ridiculous or quite clearly not against company rules, such as *'being unwilling to go on a course'* and *'criticizing a report template'*.
46. The investigation into these allegations, which was carried out by a department called Group Fraud & Security, took almost a year, largely because of my health problems, which included being twice rushed to hospital in an ambulance with a suspected heart attack.
47. Eventually, in October 2003, Group Fraud & Security reported that the allegations against me were without foundation. My management then offered me a package and when I refused they sacked me on 19 December 2003.
48. I immediately started an action for unfair dismissal but withdrew from this when my wife, without my knowledge, contacted the bank and resurrected the package that they had offered me previously. I accepted this package and signed the associated compromise agreement in January 2004 for the sole reason that I was very worried that a protracted legal action against the bank would kill me.
49. I was on incapacity benefit for some time afterwards and it was only gradually that my health recovered somewhat - although I will never recover fully. I was still not sufficiently recovered when the 6 year time limit for starting an action for harassment against the bank ran out in December 2009 [2008] but I started an action nonetheless. Three years later we have still not got past the point of having case management conferences about a preliminary issue, which is the question of whether I signed the compromise agreement under duress. The other hearing being held today concerns a limited CRO issued against me in relation to this case.

Follow-up actions

50. It is important to understand that my action against Lloyds TSB and various directors and members of staff for harassment, personal injury, negligence and breach of contract is for the purpose of obtaining a personal remedy for the wrongs done to me and that I started that action 6 years after I was suspended and only then because the time limit was approaching.
51. In contrast to this I have pursued the whistleblowing matter from the moment I was suspended, with the aim of ensuring that it was brought to the attention of the relevant authorities and (more importantly) properly dealt with by them. My application for a judicial review of the ICAEW is part of this process.
52. On the one hand therefore I am seeking a private remedy for the injustice done to me personally and, on the other hand, I am seeking a public remedy for the wrongs done by Scottish Widows

and Lloyds TSB to the millions of policyholders of Scottish Widows and the other life companies. It is the second process that is by far the most important of course.

53. Initially I simply reported my concerns to my own line management in accordance with established internal procedures. It was only when my line management refused to investigate my concerns that I sought advice from the Ethics Advisory Service of the ICAEW, which, when I followed it, led to my suspension.
54. Immediately after I was suspended I referred the matter to Ewan Brown, Chairman of the Audit Committee, Peter Ellwood, Group Chief Executive and Michael Green, Director of Group Risk Management. They refused to act and Ewan Brown, a Chartered Accountant, even had the temerity to demand that I should provide more evidence, which demand was rather difficult to comply with by someone who had been suspended and, in any event, went against the clear government advice given to whistleblowers that their only duty is to report their concerns not to investigate them.
55. Having failed to get the matter investigated internally I referred the matter to those external agencies or authorities which I believed had responsibilities in this area including the Institute of Internal Auditors, the Institute of Chartered Accountants of Scotland, the Institute of Chartered Accountants in England & Wales, the Accountancy and Actuarial Discipline Board (who investigated the Equitable Life crisis), the FSA (who investigated the Equitable Life crisis), the Treasury Select Committee (who investigated the Equitable Life crisis), the Parliamentary Ombudsman (who investigated the Equitable Life crisis) and the European Parliament (who also investigated the Equitable Life crisis). Essentially therefore I referred the matter to those bodies which either had investigated or were investigating the Equitable Life crisis and I did so on the quite reasonable and obvious basis that the situation of Scottish Widows exactly paralleled that of Equitable Life (with the exception that Scottish Widows was rescued by Lloyds TSB). I also reported the matter to the Police on the grounds that the directors of both Scottish Widows and Lloyds TSB had committed criminal offences as described.
56. Having had no preconceptions about the matter I was deeply shocked by the way in which these bodies reacted, which was characterised by delay, obstruction, evasion, and when that didn't work, outright lies. The general approach adopted by all these bodies was either to deny that they had any jurisdiction or to adopt the approach that they wouldn't investigate the matter to obtain the evidence until I had provided the evidence that they would have obtained by carrying out an investigation i.e. they effectively said *'We won't investigate it until you prove it and you can't prove it until we investigate it.'*
57. My last resort in trying to get these bodies to fulfil their duties has of course been to apply to the courts. I have done this by applying for a judicial review of the Parliamentary Ombudsman's decision that my complaint was outside her jurisdiction and I am doing it now in relation to the ICAEW's refusal to assess my complaint to them in accordance with their own complaints procedures.
58. I cannot go into the detailed history of these matters but, by way of illustration, I would point out two things:
    58.1. Firstly, that my application for a judicial review of the Parliamentary Ombudsman went to the Court of Appeal and was rejected on the grounds that the Parliamentary Ombudsman had, as she had argued, no jurisdiction over the FSA in relation to the subject matter of my complaint, which was the FSA's supervision of the GAR liabilities of Scottish

Widows. You will appreciate the slight contradiction here, which is that at the precise moment that the Court of Appeal rejected my application for a judicial review of the Parliamentary Ombudsman's refusal to investigate my complaint about the FSA's supervision of the GAR liabilities of Scottish Widows on the basis that the Parliamentary Ombudsman had no jurisdiction in the matter, that same Parliamentary Ombudsman was in the middle of an investigation into FSA's supervision of the GAR liabilities of Equitable Life during the same period.

58.2. Secondly, that my complaint to the FSA, which included allegations of criminal conduct on the part of the directors of Lloyds TSB, was rejected by a Managing Director of the FSA who at the time was negotiating with Lloyds TSB for a job at twice her then salary – which job she took a month later. When I complained to the FSA about this they denied that this person was responsible for the letter to my MP rejecting my complaint which she had personally signed. This woman is now on the board of the UKs leading whistleblower organisation. My subsequent letter of complaint to Complaints Commissioner was rejected on the grounds that the person concerned was not responsible for a letter she had personally signed.

My first complaint to the ICAEW

59. On 23 November 2007 I made my first complaint to the ICAEW, which concerned PwC's failure to qualify the accounts of Scottish Widows for 1998 and 1999 in respect of GAR liabilities. I later extended this complaint to include PwC's failure to qualify the consolidated accounts of Lloyds TSB in respect of the same GAR liabilities for 1999, 2000 and 2001.
60. The Professional Conduct Department of the ICAEW initially said that they disagreed with my view that PwC were wrong not to have qualified these accounts. I then asked for this assessment to be reviewed and the reviewer also disagreed with my view. I then asked for my complaint to be referred to the Investigation Committee who decided that my complaint did not amount to a complaint (under Bye-Law 9(3)).
61. I would like to make the following points:

61.1. The Investigation Committee rejected my complaint on the basis that it was not a complaint under Bye-Law 9(3).

61.2. Bye-Law 9(3) says:

> *'In these bye-laws any facts or matters which –*
> *(a) have come to the attention of the head of staff under paragraph (1) or otherwise; and*
> *(b) indicate that a member, a firm or a provisional member may have become liable to disciplinary action under these bye-laws or the AADB Scheme or the JDS,*
> *are referred to as a "complaint".'*

61.3. Bye-Law 9(4) says:

> *'Any dispute relating to –*

(a) a decision of the head of staff as to whether any facts or matters fall within paragraph (3)(b); or
(b) an opinion formed by him as mentioned in paragraph (1), (2), (3)(a) or 3(b) of bye-law 10,
shall be referred to and determined by the Investigation Committee.'

61.4. The Professional Conduct Department did not at any point say that they were rejecting my complaint on the basis that it was not a complaint under Bye-Law 9(3) and there was therefore no dispute as to whether my complaint was a complaint in accordance with Bye-Law 9(3). They even referred to my complaint as a complaint in several letters and E-Mails.

61.5. Because there was no dispute as to whether my complaint was a complaint under Bye-Law 9(3) there cannot have been a referral to the Investigation Committee under Bye-Law 9(4).

61.6. Because my complaint was not referred to the Investigation Committee under Bye-Law 9(4) they had no authority to determine my complaint under that Bye-Law.

61.7. My complaint can therefore only have been assessed by the Professional Conduct Department under Bye-Law 10(4) which says:

'If, as regards any complaint not laid before the Investigation Committee under paragraph (1) [where the Head of Staff thinks a complaint should be dealt with by the AADB] *, the head of staff does not think it appropriate to make an attempt under paragraph (2)* [conciliation]*, he shall proceed to investigate the complaint.'*

61.8. My complaint can only then have been laid before the Investigation Committee under Bye-Law 10(5) which says:

'If, having investigated a complaint under paragraph (3) or (4), the head of staff is no longer of the opinion that the member, the firm or the provisional member concerned may have become liable to disciplinary action under these bye-laws, he shall take no further action with respect to the complaint unless the complainant insists on its being laid before the Investigation Committee; but if the head of staff remains of that opinion or the complainant so insists, the head of staff shall lay the complaint before the Investigation Committee.'

61.9. Since my complaint was laid before the Investigation Committee under Bye-Law 10(5) it can only have been rejected by that Committee under Bye-Law 15(1) on the grounds that there was no prima facie case.

61.10. If the Investigation Committee dismisses a complaint under Bye-Law 15(1) the complainant has the right under Bye-Law 17(2) to have the complaint referred to the independent Reviewer of Complaints.

61.11. On 30 November 2009 I wrote to the Professional Conduct Department to ask whether I had any right of appeal with respect to my complaint.

61.12. On 4 November 2009 the Professional Conduct Department wrote to me to say that *'the application to the Investigation Committee under Bye-law 9(4) represents the end of the Institutes process and there is no further appeal under the Institute's Bye-laws. As this is the end of the process future correspondence received from you will only be responded to if we consider it appropriate.'*

61.13. In the light of what I have said above it is clear:

61.13.1. That the Investigation Committee rejected my complaint under Bye-Law 9(4) when they had no authority to do so (because my complaint had not been referred to them under that Bye-Law – and if it was it should not have been because at no stage was there a dispute between myself and the Professional Conduct Department as to whether my complaint was a complaint).

61.13.2. That the Investigation Committee did this in order to prevent me from applying to have my complaint reviewed by the Independent Reviewer of Complaints.

61.13.3. That, on this basis, the Professional Conduct Department was wrong to say that I had no right of appeal because I did have the right to ask for my complaint to be referred to the Reviewer of Complaints under Bye-Law 17(2).

61.13.4. That because the ICAEW deliberately concealed my right to have my complaint referred to the Reviewer of Complaints I still have the right to do this under Bye-Law 17(3) on the grounds that I could not have reasonably made an application to him before I became aware of the concealment (which was on 1 March 2010).

61.13.5. Bye-Law 17(2) says:

> *'A complainant may apply in writing to the head of staff for a review of the finding, and the head of staff shall refer every such application to a Reviewer of Complaints ("the Reviewer") who, subject to paragraph (3), shall consider the application.'*

61.14. Bye-Law 17(3) says:

> *'The Reviewer shall not consider the application if it was received by the head of staff after the end of the period of six months beginning with the date of the finding unless –*
> *(a) the Reviewer is satisfied that the complainant could not reasonably have been expected to make the application within that period;*
> *or*
> *(b) there is, in the opinion of the Reviewer, fresh evidence justifying consideration of the application.'*

62. This conduct on the part of the ICAEW demonstrates quite clearly the lengths to which they were prepared to go to in order avoid investigating my complaint in accordance with their own rules.

63. On 29 June 2010 I sought to introduce significant new evidence in relation to my complaint against PwC. This evidence was the Joint Disciplinary Tribunal's report of June 2010 into the conduct of Ernst & Young as auditors of Equitable Life, who had started their investigation in

2001 and had taken 9 years to complete. The report concluded that Ernst & Young were wrong not to have qualified Equitable Life's 1998 accounts in respect of GAR liabilities in the absence of specific legal advice to the contrary.

64. The JDC's finding **directly contradicted** the ICAEWs finding in relation to my complaint to the effect that PwC were not at fault in failing to qualify Scottish Widows' 1998 accounts in respect of their GAR liabilities. The consequence of the JDCs finding could not have been clearer; if Ernst & Young should have qualified Equitable Life's 1998 accounts in respect of GAR liabilities then PwC should have qualified Scottish Widows 1998 accounts in respect of GAR liabilities. It was as simple as that.
65. Nonetheless, the ICAEW replied *'I would draw your attention to Mr Farren's email dated 3 November 2009 timed at 15:35 in which he writes (third paragraph). "As this is the end of the process future correspondence received from you on this matter will only be responded to if we consider it appropriate." I have therefore filed your recent correspondence with the closed file.'*
66. There was no further correspondence in relation to this complaint.

My second complaint to the ICAEW

67. On 26 July 2010 I made a second complaint to the ICAEW, being the complaint which is the subject of this application for judicial review. This complaint was against the auditors of the 9 life companies referred to (but not identified) in the Parliamentary Ombudsman's report into the Equitable Life crisis and was made on the basis of the JDC's report on the conduct of Equitable Life's auditors, Ernst & Young, and (inter alia) their failure to qualify the 1998 accounts of that company.
68. The ICAEW failed to respond to this complaint and I therefore applied for a judicial review.

The defendant's grounds for contesting the claim

69. The ICAEW contested my claim on the basis that:
    69.1. My complaint of 1 July 2010 (actually 29 June 2010) was the same complaint as my first complaint against PwC determined by the ICAEW in October 2009.
    69.2. My complaint of 26 July 2010 *'concerned the same matters and issues'* as my earlier complaint against PwC and that this earlier complaint was now outside the 3 month time limit.
    69.3. My complaint of 16 July 2010 did not identify the members or firms complained about.

Refusal of permission on the papers

70. On 7 January 2001 the court rejected my application on the basis that:
    70.1. The actual complaint against PwC had been considered on two previous occasions and was not out of time.
    70.2. No good reason had been provided to extend the time.

70.3. The defendant was entitled to take the view that the JDS report on Ernst & Young's conduct as auditors of Equitable Life did not affect the position.

71. I will now deal with these issues in turn.

A repetition of my earlier complaint against PwC?

72. My complaint of 26 July 2010 was against the auditors of the 9 life companies (other than Equitable Life) which the Parliamentary Ombudsman's report on the Equitable Life crisis had identified were a cause for concern on account of their GAR liabilities. It makes no mention of PwC. I do not know whether PwC is one of these auditors, the ICAEW do not know and the judge certainly did not know. It is of course possible that PwC are not one of these auditors. The judge therefore had no justification whatsoever for concluding that my complaint related to PwC.
73. Further, the ICAEW ruled in relation to my first complaint that there was no indication of any cause for concern in relation to Scottish Widows' GAR liabilities in 1998, in which case Scottish Widows **cannot** be one of the companies referred to by the Parliamentary Ombudsman as being a cause for concern in 1998 and so **cannot** be one of the companies included in my second complaint. In other words, the ICAEWs assertion that my second complaint is the same as my first complaint is directly contradicted by their own finding in relation to my first complaint.
74. In any event, even if Scottish Widows was one of the companies which were a cause for concern, and so is covered by my second complaint, this does not mean that there is no basis for a complaint in respect of the other 8 companies. Each case must be considered on its own merits. Let me illustrate this point.
75. Assume that I complain to the ICAEW that accountant A has committed a fraud. That is one complaint.
76. If I then complain to the ICAEW that accountant B was involved in the same fraud then that is a second and separate complaint against accountant B. The ICAEW is not entitled to conclude that because they found that accountant A did not commit a fraud that accountant B also did not commit a fraud. It must assess the complaint against accountant B on its merits.
77. Take the argument further. If complaints against two accountants in respect of a single fraud cannot be treated as one complaint then it must certainly be the case that two complaints against two accountants in respect of similar but different frauds cannot be treated as the same complaint.
78. If follows that even if the ICAEW found, as they did, that there was no case against PwC, they cannot conclude on this basis alone that there is no possible case against any other auditor of a life company. Such a proposition is plainly ridiculous.
79. The simple and obvious rule is that every complaint must be treated on its own merits. This is demonstrated simply by assuming that the finding had been the reverse. In other words, if the ICAEW had found the PwC were guilty would they be entitled to conclude that the auditors of the other 9 companies were guilty as well? Clearly not. To do such a thing would go against the most basic rules of justice. So, in the same way that no-one should be found guilty by mere association, no-one should be found innocent by mere association.

No new grounds?

80. With regard to the ICAEW's assertion that the JDC's report of June 2010 did not constitute sufficient new grounds I have already pointed out that that report directly contradicted the ICAEW's finding that there was no reason for PwC to qualify Scottish Widows' 1998 accounts in respect of GAR liabilities because it concluded, in exactly parallel circumstances, that Ernst & Young should have qualified Equitable Life's 1998 accounts in respect of GAR liabilities in the absence of legal advice to the contrary. To assert otherwise is equivalent to the Parliamentary Ombudsman's assertion that the FSA's supervision of the GAR liabilities of Scottish Widows in 1998 was outside her jurisdiction actually while she was in the middle of carrying out an investigation into the FSA's supervision of the GAR liabilities of Equitable Life in 1998. It is an assertion that is so outrageous that the mere making of it is almost beyond belief.
81. Sir Jonathan Parker concluded that Ernst & Young should have qualified the 1998 accounts of Equitable Life in the absence of specific legal advice to the effect that they did not need to do so. This gives rise to the very reasonable question of why the accounts of the other nine life companies whose GAR liabilities were, according to the Parliamentary Ombudsman, a cause for at that time (i.e. 1998) were not qualified.
82. One CANNOT conclude that because the 1998 accounts of these other life companies were not qualified that the auditors of these companies DID obtain legal advice to the effect that they did not need to qualify those accounts. On the contrary, because we KNOW that these liabilities were a cause for concern (meaning that they were large enough to threaten the survival of the life companies concerned) we can reasonably conclude that no-one would have been prepared to give such legal advice (Who on earth would be prepared to give legal advice to the effect that it is unnecessary to qualify the accounts of a company which clearly might go bust in the near future, as Equitable Life did? *'Excuse me, Mr. Lawyer. We have a company here that might go bust in the next few months. Will you give us a legal opinion which says that we do not need to qualify their accounts in respect of the matter which might make them go bust? Thank you.'*).
83. We can therefore say to ourselves *'Given that it is extremely unlikely that anyone would have been prepared to give legal advice to the effect that it was not necessary to qualify the accounts of these eight other life companies, this MUST logically mean that the auditors of those other life companies issued unqualified audit reports WITHOUT having obtained such legal advice; the advice which Sir Jonathan Parker's report it makes clear should be obtained where there are significant GAR liabilities.'*

Extending time limits

84. I did not apply for an extension of time for the simple reason that my application for judicial review was made within three months of making my complaint.
85. However, as I have explained above, it is now clear that the ICAEW rejected my first complaint on spurious grounds in breach of their own bye-laws and that they did this with the intention of depriving me of and concealing from me my right to have my complaint reviewed by the Reviewer of Complaints.
86. It follows that even if my second complaint is a mere repetition of my first complaint that this deliberate concealment by the ICAEW would justify an extension of time on its own. It would be

an affront to justice if the ICAEW were to be allowed to get away with such deceitful and underhand conduct. How can a regulator be allowed to get away with deliberate deception involving lying about their own rules?

A generalised complaint

87. With regard to the defendant's assertion that my complaint was *'generalised and unspecific'* (para. 2 of the Summary Grounds for Contesting the Claim) I refer to a letter dated 13/12/1991 to Sir Tam Dalyell from the Chief Constable and Deputy Chief Constable of Lothian & Borders Police in which they said said: *'the police have a duty to investigate all criminal matters that come to their notice, either as a result of a direct report or allegation, or as a product of information received. Such information would include rumour and speculation, some of which is true but so often false, and facts reported to us by known informants. It is not our practice to ignore reports falling within these categories, but our duty is to investigate all criminal matters arising from these reports and submit all the evidence gathered to the Crown, through the Procurator Fiscal.'* ('The Report on an Inquiry into an Allegation of a Conspiracy to Pervert the Course of Justice in Scotland' dated 26 January 1993, para.12.22).
88. It is quite clear, on this basis, that:
    88.1. it is the duty of a regulatory authority, such as the ICAEW, to carry out investigations to ascertain the facts;
    88.2. it is not the duty of the complainant to present a 'finished case' to a regulatory authority and it is unreasonable for the regulatory authority to expect the complainant to do so;
    88.3. the complainant will often have no authority to carry out an investigation to ascertain the facts and their only duty is to report their concerns to the relevant authority; indeed, in some cases (whistleblowers for instance) complainants are officially advised NOT to carry out an investigation but merely to report their concerns (e.g. Audit Scotland's guidance note on whistleblowing (ISBN 1 904651 14 3));
    88.4. it is therefore not only unreasonable but preposterous for the ICAEW to reject a complaint on the basis that the complainant has not provided information which could only be ascertained by an investigation. As I have made clear that is their job, not mine;
    88.5. the critical point is that I have given the ICAEW enough information to allow them to ascertain the facts; that is all that is required;

Conclusion

89. In conclusion I would say:
    89.1. That the complaint to which this application relates is not a repetition of my earlier complaint against PwC, that PwC may well not be one of the auditors of the 9 life companies which were the subject of that complaint and that to effectively find the auditors of these 9 life companies innocent by mere association is an affront to every principle of justice. Each complaint should be assessed on its own merits.
    89.2. That the JDC's report of June 2010 directly contradicts the ICAEW's finding in relation to my first complaint.

89.3. That even if my second complaint were a mere repetition of my first complaint that the ICAEW's deliberate concealment of my right to a review of that first complaint by the Reviewer of Complaints would justify an extension of time on the basis that the ICAEW should not be allowed to benefit from their own misdemeanour.

90. <u>In other words if my complaint is a new complaint it is not out of time, if it is not a new complaint then there are new grounds and if there are no new grounds there are good reasons to extend the time limit. Whichever it is, the ICAEW should assess my complaint according to their own complaints procedures, which is all I am asking that they be required to do.</u>

91. Lastly I would remind the court that the purpose of the permission stage of judicial review proceedings is to weed out malicious, futile applications or applications without merit. It is clear from what I have said not only that there are serious legal arguments that need to be considered but that the underlying issue, which is integrity in the auditing process and the failure of self-regulation of the auditing profession, could hardly be more serious or, at this time, more relevant or urgent of resolution. I am an honest man seeking justice and the ICAEW must be held to account.