

FINANCIAL PLANNING ASSOCIATION OF AUSTRALIA

**CONDUCT REVIEW COMMISSION
DISCIPLINARY PANEL**

REGARDING: **ROBERT TOMASELLO**

DETERMINATION: **CRC 2015_1**

PANEL: Mr M Vincent, Deputy Chair
Mr M Perkins
Mr D Moses

DATE OF DETERMINATION: 31 July 2015

CATCHWORDS: Code of Professional Practice – Rules of Professional Conduct – Rule 7.35 – breach - financial planner borrowed money from client

Code of Professional Practice – Code of Ethics – Ethics Principle 1 – placing the client’s interests first – breach – planner placed personal gain or advantage before client’s interests – loan terms favourable to planner – whether planner acted honestly

Disciplinary Regulation 2011 – clause 70 – breach - whether member provided reasonable assistance with investigation and disciplinary proceedings

Disciplinary Regulation 2011 – clause 13 determination – whether required – whether conduct complained of occurred within 3 years of the complaint

Disciplinary Regulation 2011 – sanctions – expulsion – payment of FPA’s costs and expenses

CASES CITED: *Re CFP Practitioner Member CRC*
2013_1

DATES OF HEARING: 2 April 2015

PLACE MADE: Sydney

APPEARANCES: Mr M Murphy for the FPA
Mr Tomasello did not appear

DETERMINATION

1. The Panel decides Mr Tomasello's conduct has:
 - (a) breached Rule 7.35 of the Code of Professional Practice because Mr Tomasello borrowed money from a client;
 - (b) breached Ethics Principle 1 of the Code of Ethics of the Code of Professional Practice because the terms of the loan by which Mr Tomasello borrowed money from his client failed to place the client's interests first, and placed Mr Tomasello's personal advantage or gain before the client's interests;
 - (c) committed Special Breaches of clause 70 of the Disciplinary Regulation 2011 because Mr Tomasello failed to give reasonable assistance to the FPA during the course of:
 - (i) the FPA's investigation of the complaint into his conduct;
 - (ii) the disciplinary proceedings against Mr Tomasello.

2. The Panel imposes upon Mr Tomasello sanctions of:
 - (a) expulsion from membership of the FPA;
 - (b) payment of the FPA's costs and expenses:
 - (i) as itemised in Standard Determination 1 of Schedule B to the Disciplinary Regulation 2011;
 - (ii) within 21 days of Mr Tomasello being advised of the amount of those costs and expenses.

[signed]

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Mr M Vincent, Deputy Chair
Mr M Perkins
Mr D Moses

THE PANEL'S REASONS FOR ITS DETERMINATION

What the determination is about

1. The determination decides whether Robert Tomasello committed one or more breaches of the FPA's Code of Professional Practice ("Code"), or of the FPA Disciplinary Regulation 2011 ("Disciplinary Regulation").
2. The determination also decides what, if any, sanction is appropriately imposed upon Mr Tomasello.

Who has made the determination

3. The determination has been made by a Disciplinary Panel ("Panel") of the FPA's Conduct Review Commission ("Commission"). The Commission is established under the FPA Constitution and the Disciplinary Regulation to regulate the conduct of FPA members.
4. Members of the FPA, when commencing or renewing their membership, are bound by the Constitution and agree to be bound by any regulations made by the FPA Board. The Disciplinary Regulation has been made by the Board.

What breaches are alleged to have occurred

5. The case put to the Panel by the FPA was that Mr Tomasello has committed 4 breaches:
 - a breach of Rule 7.35 of the Rules of Professional Conduct of the Code by borrowing money from a client;
 - a breach of Principle 1 of the Code of Ethics of the Code, by Mr Tomasello placing his own interests ahead of those of his clients, because the loan terms were favorable to Mr Tomasello and unfavourable to the clients; and
 - 2 Special Breaches of the Disciplinary Regulation by failing to meet his duty to provide reasonable assistance to the FPA during its investigation into his conduct, and during the resulting disciplinary proceedings, because Mr Tomasello failed to respond to requests for information and documents.

How the allegations arise

6. The allegations have arisen following Mr Tomasello contacting the FPA by telephone on 3 June 2014, where he advised the FPA that his authorised

representative status had been revoked by his licensee, Charter Financial Planning Limited (“Charter”).

7. During the telephone conversation Mr Tomasello said his authorisation had been revoked because he had borrowed money from a client.

The action taken by the FPA

8. These reasons set out in some detail the course of action taken by the FPA because it is alleged Mr Tomasello failed to give reasonable assistance to the FPA during the course of investigations and the resulting disciplinary proceedings, in breach of the Disciplinary Regulation.

The FPA makes inquiries

9. The first step taken by the FPA was to write to Mr Tomasello on 5 June 2014 seeking further information. Mr Tomasello wrote a 3 page letter in response on 16 June.
10. The FPA emailed Mr Tomasello on 2 July 2104 asking 14 more questions; questions which arose out of Mr Tomasello’s letter. Mr Tomasello replied by email on 7 July 2014. There was a further exchange of emails on 24 July in which Mr Tomasello forwarded a copy of the loan agreement.

The FPA makes a complaint

11. On 19 August 2014 the FPA made a “complaint” about Mr Tomasello’s conduct. Under the Disciplinary Regulation a complaint is the process by which an enquiry into a member’s conduct is commenced.
12. The Disciplinary Regulation permits the FPA itself to make a complaint. For the FPA to make a complaint it must be authorised by the General Manager, Professional Standards (clause 10 requires the authorisation).
13. The complaint was authorised on 19 August 2104. Mr Tomasello was advised of it the following day.
14. The complaint alleged that in September 2010 Mr Tomasello, on behalf of his former financial planning business, had entered a private loan agreement to borrow \$990k from a client so that Mr Tomasello could build a house.
15. The complaint also alleged exacerbating factors:
 - Mr Tomasello was now unable to repay the loan;

- Mr Tomasello's business – which was to provide security – had been placed into administration and then wound up; and
- Mr Tomasello had prepared the loan agreement and to his understanding the client did not obtain legal advice before entering the agreement.

The FPA investigates the complaint

16. On 10 September 2014 the FPA wrote to Mr Tomasello seeking responses to further questions. They included questions concerning the house constructed by Mr Tomasello, and the loan agreement with the client.
17. Mr Tomasello did not respond to those questions, even after the FPA made follow-up enquiries.
18. However, in an email of 14 October 2014, Mr Tomasello sought to resign from the FPA.
19. The FPA replied by letter that same day, advising Mr Tomasello (correctly) that under the FPA Constitution the FPA could not accept his resignation since his conduct was the subject of a current investigation, and that he remained bound by the Constitution and any regulations. The letter again asked Mr Tomasello to answer questions previously asked of him; he did not respond.

Institution of disciplinary proceedings

20. Having completed its investigation, the FPA on 12 November 2014 reported to the Chair of the Commission recommending the institution of disciplinary proceedings in respect of alleged breaches of Rule 7.35 and Ethics Principle 1 of the Code, and a Special Breach of the Disciplinary Regulation by failing to provide requested information and documents in response to the complaint.
21. The Chair of the Commission is charged by the Disciplinary Regulation with deciding what action to take in response to the investigating officer's report. The Chair instructed the FPA to issue a Notice of Disciplinary Breach as had been recommended.
22. A Notice of Disciplinary Breach is the process by which disciplinary proceedings are commenced.
23. A Notice was issued on 19 December 2014.
24. Mr Tomasello did not respond to the Notice, despite the Notice and the Disciplinary Regulation requiring him to do so.

25. On 29 January 2015 the investigating officer made a further report to the Chair of the Commission, recommending the matter proceed to a hearing. The report submitted that the failure to provide reasonable assistance now extended to failing to respond to the Notice issued 19 December 2014.
26. On 4 March 2015 the Chair decided that the disciplinary proceedings were to proceed to a hearing before a Disciplinary Panel on the 3 breaches previously identified, together with an additional Special Breach constituted by failing to respond to the Notice of Disciplinary Breach.
27. A Notice of Disciplinary Hearing was issued on 9 March 2015.
28. On 20 March 2015 Mr Tomasello emailed the FPA. In that email he advised he would not appear at the hearing. Having been asked to reconsider, Mr Tomasello sent a further email on 23 March. Mr Tomasello did not say he had changed his position.

Evidence before the Panel

29. The proceedings were heard by the Panel on 2 April 2015.
30. Mr Tomasello did not appear before the Panel. However, his earlier correspondence with the FPA provided information as to what had occurred. The FPA had also obtained information from other sources during the course of its investigation.
31. Mr Tomasello had been in the financial services industry since at least 1987. He became a member of the FPA in 1995 and was granted CFP status in 2002.
32. Mr Tomasello carried on business through iAdvise Financial Services Pty Limited (“iAdvise”). He was a director of iAdvise.
33. On 1 January 2004 both Mr Tomasello and iAdvise became Authorised Financial Services Representatives of Charter.
34. In 2008 Mr Tomasello and his wife sold their Strathfield home, intending to build a new house nearby. A development application for the new building went before Strathfield Council in August 2008.
35. The Tomasellos had invested some \$500,000 via a mortgage broker pending the funds being needed for the development. In December 2009 the broker advised the funds had been lost.
36. By early 2010 the Tomasellos’ new house was at the lock-up stage but incomplete in fit-out.

37. Also at that stage the income being received from the financial planning business had dropped in the order of \$150,00 per annum. Mr Tomasello attributed the downturn to the GFC. According to Mr Tomasello he and his wife were faced with selling the house in the state it was or borrowing to complete it. They were unsuccessful in their attempts to borrow from their bank or brokers.
38. Mr Tomasello had an elderly client who had over \$2M in investment funds. The client relationship had commenced in 2007.
39. Much of the client's money was held in a trust. The trust deed was not available to the Panel, but Mr Tomasello named two beneficiaries of the trust.
40. Mr Tomasello says the two beneficiaries had powers of attorney in respect of the elderly client, who by this time was aged 78 and in deteriorating health. Mr Tomasello says he advised the beneficiaries to adopt the powers of attorney by way of referral to a solicitor.
41. In circumstances that Mr Tomasello did not clearly remember, he discussed his financial difficulties with the attorneys. At that stage the elderly client had entered a nursing home.
42. Mr Tomasello drew up a loan agreement, which he had amended from a document prepared by a mortgage broker (apparently the broker with whom Mr Tomasello had unsuccessfully invested funds). Mr Tomasello left the loan agreement with the attorneys, but as far as he knew they did not discuss it with an accountant or solicitor.
43. About a week later the attorneys advised they had discussed things with the elderly client, who was prepared to loan the funds.
44. The loan agreement was executed and dated 22 September 2010. The named parties to the loan were the trust and iAdvise, with Mr Tomasello stated to be "acting as the agent of iAdvise". However elsewhere Mr Tomasello has said he was the borrower.
45. The loan agreement included terms that:
 - each amount advanced was to be repaid 36 months after the date of advancement;
 - the interest rate was 6%;
 - interest in respect of an advance was payable upon the repayment of an advance;
 - the loan was secured against iAdvise.
46. The loan did not provide for interest to be compounded.
47. The FPA had obtained historical data from the RBA that showed various indicative lending rates as at September 2010. The indicative interest rate

for one-year cash bank deposits at that time was 6%; that for a standard variable housing loan was 7.4%.

48. Loan funds were drawn down as invoices were received from the builder. The date and amount of each drawdown, together with a calculation of the interest payable on each drawdown, was added to a schedule to the loan document and initialed by the parties. The drawdowns were:

23 September 2010	\$160,000
3 November 2010	\$160,000
2 December 2010	\$ 85,000
16 February 2011	\$270,000
28 June 2011	\$220,000
17 November 2011	\$ 95,000
Total of advances	\$990,000

According to the schedule, the first repayment of \$188,800 of principal and interest (ie \$160,000 + 3 x 160,000 x 0.06) would have been due 23 September 2013.

49. The house was completed in September 2012.
50. The elderly client died in November 2012.
51. On 20 December 2012 iAdvise resolved that it be wound up in liquidation. Mr Tomasello says that was done on advice from solicitors and accountants as the company had been incurring losses.
52. The report to creditors by the liquidator did not list any loan to iAdvise amongst its liabilities.
53. There is no evidence before the Panel as to whether the deteriorating state of affairs of iAdvise had been communicated to the elderly client, his attorneys, or his estate. Whatever state the relationship between the parties to the loan had earlier been in, Mr Tomasello says that in “early 2013 they had put the matter into the hands of a solicitor”.
54. There was neither payment of interest nor repayment of capital when the repayments became due.
55. There were negotiations for repayment of the loan during 2013 and 2014. These were unsuccessful.
56. There were unsuccessful attempts to sell the house from late 2013. Eventually the property was sold by way of mortgagee sale in 2014. It would appear that Mr Tomasello had other assets; the mortgagee appears to have sold these also.

57. Sometime after the mortgagee sale Mr Tomasello says he repaid approximately \$380,000 of the loan.
58. He says he now has no assets.
59. On 20 May 2014 Charter revoked Mr Tomasello's authorisation. (The ASIC Australian Financial Services Representative record shows the authorisation of iAdvise ceasing on 8 May 2014 – despite its earlier liquidation).
60. Mr Tomasello has subsequently obtained employment elsewhere.
61. At the conclusion of the hearing the Panel asked for the evidence before it to be supplemented by the provision of any determination made under clause 13 of the Disciplinary Regulation, as one of the requirements of the complaints-making process is that a determination needs to be made under clause 13 in order to deal with conduct occurring more than 3 years prior to the making of the complaint. The complaint, made August 2104, had alleged the loan had been made in September 2010.
62. The Panel's request brought to light that no discrete clause 13 determination had been made.

The issues for the Panel to decide

63. The issues for the Panel to decide are:
 - What is the effect of no determination having been made under clause 13 of the Disciplinary Regulation.
 - Whether Rule 7.35 has been breached.
 - Whether Ethics Principle 1 has been breached.
 - Whether Mr Tomasello has committed a Special Breach of the Disciplinary Regulation by failing to provide reasonable assistance to the FPA.
 - Depending on the findings on the above issues, what action should be taken in respect of Mr Tomasello.

The Panel's findings

The absence of a clause 13 determination

64. Clauses 12 and 13 of the Disciplinary Regulation provide:

12. A complaint may be made about the conduct of an FPA Member irrespective of when the conduct is alleged to have occurred.
13. However, a complaint cannot be dealt with (other than to record it and dismiss it) if the complaint is made more than 3 years after the conduct is alleged to have occurred, unless a determination is made under this clause that:
 - a) it is just and fair to deal with the complaint having regard to the delay and the reasons for the delay; or
 - b) the complaint involves an allegation of Malpractice and it is in the public interest to deal with the complaint.
65. The authorisation referred to in clause 13 is to be made by the General Manager, Professional Standards.
66. A complaint, defined in the Disciplinary Regulation as “an expression of dissatisfaction or grievance ... in relation to the conduct of a Member”, is the trigger that initiates enquiry into a member’s conduct. (There is no definition of “conduct”).
67. Whilst the initiating process for investigation into conduct is the complaint, it is the member’s conduct that is the subject of investigation and any resulting disciplinary proceedings. The inquiry is into whether conduct amounts to a breach of the Code of Professional Practice, the Constitution, the Disciplinary Regulation, or any other regulation or prescribed policy made by the Board.
68. The complaint, as expressed on 19 August 2014, alleged that in September 2010 Mr Tomasello, on behalf of his former financial planning business, had entered a private loan agreement to borrow \$990k from a client for the purpose of Mr Tomasello building a residence. To the extent the complaint is about Mr Tomasello having entered into a loan agreement on a particular date, that event falls outside the 3-year period.
69. By the time the matter had developed into disciplinary proceedings, the allegation put by the FPA to the Panel was simply one of having borrowed money from clients.
70. The substance of the conduct that was complained of, investigated and which became the subject of disciplinary proceedings is that Mr Tomasello has borrowed money; and has done so on terms disadvantageous to the client.
71. The Panel notes the loan has not been repaid.
72. The Panel finds the conduct complained of has occurred within 3 years of the complaint, and accordingly no clause 13 determination was required.

73. There is no prescribed or recommended form for making a complaint. That reflects the reality that complaints may be made by members of the public, including clients, who do not have any specialist knowledge or training.
74. Once a complaint has been made, the investigation into conduct may extend beyond the allegations made in the complaint. In the course of an investigation, the FPA will necessarily obtain and look at material stretching back over many years.
75. As stated, clause 13 does not provide that the FPA cannot investigate conduct more than 3 years prior to the making of the complaint, nor that the FPA cannot investigate conduct to determine whether or not it occurred more than 3 years prior to the making of the complaint. The limitation given by clause 13 is as to how a complaint may be disposed of.
76. Clause 13 mediates the respective rights of the FPA and its members.
77. In an appropriate case, the test given by clause 13(a) that is just and fair to deal with the complaint having regard to the delay and the reasons for the delay would include an assessment of whether it would be just and fair to the member, as well as to the complainant, and potentially other persons, for the complaint be dealt with other than by being recorded and dismissed.
78. Similarly, the “public interest” element of clause 13(b), in addition to assessment of considerations broader than the interests of the member and complainant, would also require consideration of the member’s interests.
79. The Disciplinary Regulation does not limit when a clause 13 determination may be made. If the Panel had come to the view that a clause 13 determination was required in the present proceedings, it would have been prepared to adjourn the proceedings to enable the FPA to consider making a determination pursuant to clause 13.

Whether there was a loan from a client in breach of Rule 7.35 of the Code

80. The Rules of Professional Conduct are introduced at page 10 of the Code:

The Rules of Professional Conduct are the third layer of professional regulation. The Code of Ethics outlines the ethical principles for the profession and the Practice Standards describe expectations of practice for FPA Members. The Rules of Professional Conduct (“The Rules”) establish detailed obligations attaching to FPA professional membership.

81. The Rules have been substantially revised from the Rules of Professional Conduct that were instituted in 1997. The Code, at page 10, lists the purposes and functions of the Rules. These purposes and functions are to:
- complement the Code of Ethics and Practice Standards;
 - align with global standards and expectations;
 - elaborate on the professional obligations arising from the 6 Step Financial Planning Process; and
 - prescribe acceptable limits to specific practices, or the detailed application of Practice Standards.

The Code goes on to comment: “Some Rules may be designed to encourage particular behaviours or to curb perceived risks of malpractice. ... The Rules in relation to Practice Standard 7 address general obligations of conduct as well as ongoing obligations that apply throughout the financial planning process.”

82. Rule 7.35 is one of the Rules that relates to Practice Standard 7. There is extensive commentary to Practice Standard 7; the commentary includes discussion concerning the avoidance and management of conflicts of interest.
83. Rule 7.35 is one of 3 Rules under the heading “Client Assets”. It formed part of the Code when the Code was commenced in 2009, although Rule 7.35 itself only came into force on 1 July 2010. Rule 7.35 was not amended when the Code was amended in 2011 and 2013. Rule 7.35 states:

A Member must not borrow money from a client.

This Rule does not apply when:

- (a) the client is a member of the Member’s immediate family; or
- (b) the client is an institution in the business of lending money and the borrowing is unrelated to the professional services performed by the Member.

84. The Panel has recounted the unfortunate history of the loan. The FPA submitted that despite the loan agreement naming iAdvise as the borrower, the overwhelming evidence was that the funds were for the personal use of Mr Tomasello.
85. The FPA also submitted that Rule 7.35 does not discriminate in relation to the capacity in which the member borrows funds.
86. The Panel considers the purpose of Rule 7.35, as one of the 3 Rules by which a member is not to borrow from, lend to, or commingle assets with a client, is to avoid conflicts of interest arising.

87. Conflicts between the member's interests and those of the client will arise whether or not a loan is personally in the name of the member, or directly made by a member or an entity in which the member has an interest.
88. The Panel agrees with the FPA's submission that Rule 7.35 is not limited in application to situations where a loan is in a member's own name. Were it otherwise, the purpose of the Rule would be undermined.
89. The course of events following the execution to the loan agreement was consistent with Mr Tomasello being the borrower. The loan was not listed as a liability of iAdvise in the creditors' report. Mr Tomasello has said he was the borrower.
90. The Panel finds that Mr Tomasello borrowed the money from his client.
91. There was no evidence that either of the exceptions to Rule 7.35 applied.
92. Accordingly the Panel finds the breach of Rule 7.35 proven.
93. Further, the Panel considers that even if the loan had been that of iAdvise rather than Mr Tomasello, that circumstance would likewise have been in breach of Rule 7.35 given Mr Tomasello's connection with iAdvise, and the use to which the funds were put, which was for the benefit of Mr Tomasello.

Whether there was a breach of Ethics Principle 1

94. The Code at page 6 describes the Code of Ethics as follows:

The Code of Ethics is the top layer of professional regulation.

It establishes the ethical foundation for the other FPA standards of professional conduct including Practice Standards and Rules of Professional Conduct. ...

The eight principles in the Code of Ethics serve as minimum benchmarks for professional behavior.

95. Ethics Principle 1 states:

Placing the client's interests first is a hallmark of professionalism, requiring the financial planner to act honestly and not place personal and/or employer gain or advantage before the client's interests.

96. The FPA submitted that Ethics Principle 1 goes to the heart of the trusted adviser/client relationship and that it highlights that the member's primary professional obligation is to the client.
97. The FPA submitted that the personal gain or advantage of Mr Tomasello was not only in obtaining and use of the loan proceeds; but also that the loan was on better terms than would have been obtained elsewhere. The FPA pointed to the low interest rate compared to the RBA indicative rates of the time, given the risk of the investment.
98. The FPA also submitted that Mr Tomasello had not acted honestly within the meaning of Ethics Principle 1, in that he had not been forthcoming to the clients as to what an appropriate rate of interest would have been given the underlying risks of the investment.
99. The Panel notes there was no Principle in the 1997 Code of Ethics that covered the same ground as Ethics Principle 1.
100. By Ethics Principle 1 the duty of a planner is to maintain the primacy of the client's interests. The operative part of Ethics Principle 1 is the phrase "Placing the client's interests first".
101. Having stated the primacy of the client's interests, Ethics Principle 1 goes on to state requirements to:
 - act honestly; and
 - not place personal gain or advantage ahead of that of the client.
102. Implicit in Ethics Principle 1 is the recognition that conflicts of interest may occur. At the most general level it provides a means of assessing how to approach a potential conflict of interest, and deal with one that has occurred.
103. The Panel considers there will be a breach of Ethics Principle 1 where there is a failure to act honestly *or* personal gain or advantage is placed ahead of that of the client.
104. If a planner is not honest, or favours their own interests, the "client first" principle is breached. However, a failure to keep the client's interests foremost can occur even the planner is honest and not placing their own interests ahead of those of the client.
105. Placing the client's interests ahead of those of the planner is no mere weighing exercise. The Practice Standards, particularly PS 7.4 Professional Judgment, and PS 7.5 Conflicts of Interest and Prioritisation, provide extensive commentary and guidance on how to prioritise the client's interests, and how to identify, avoid and manage conflicts of interest.

106. Any circumstance where the client's affairs and those of the planner are not kept separate will raise the spectre of a breach of Ethics Principle 1. In this regard Ethics Principle 1 is backed up by Rules 7.34 to 7.36 requiring client assets to be kept separate.
107. Mr Tomasello not only failed to keep separate the two sets of affairs, he actively pursued financial support from his client. It was not an arms-length transaction. Such a scenario was doomed to fall foul of Ethics Principle 1. The only way such an arrangement could have proceeded was for the professional relationship to be terminated, the (former) client independently advised, and the loan be made as a purely private transaction.
108. The Panel finds that Mr Tomasello failed to prioritise his client's interests. He placed his own personal gain and advantage ahead of that of his client. The Panel finds each of the following circumstances amounted to Mr Tomasello favouring his own advantage or personal gain:
- He did not terminate the professional relationship;
 - He did not ensure the client sought independent advice;
 - He did not disclose the deteriorating state of iAdvise's business.
 - The loan was primarily a means to solve Mr Tomasello's financial distress;
 - The interest rate and terms did not reflect the risk of the investment.
109. The Panel was not prepared to find that Mr Tomasello had failed to act honestly; rather, the evidence showed an inability to make appropriate judgments, and an unawareness of the appropriate moral compass to be held by a member of the FPA.
110. The Panel finds the breach of Ethics Principle 1 proven.

Whether Mr Tomasello has failed to provide reasonable assistance to the FPA

111. By clause 67 of the Disciplinary Regulation an FPA member has a duty of reasonable assistance to the FPA. Clause 67 provides:

A member must provide reasonable assistance to any FPA member including an Investigating Officer in connection with any:

- a) Complaint
- b) Investigation
- c) Disciplinary Investigation
- d) Disciplinary Proceedings ...

112. Clause 68 says that reasonable assistance includes the production of documents and the provision of information.

113. By clause 70 a member commits a Special Breach by failing or refusing to provide reasonable assistance when requested by an investigating officer.
114. Mr Tomasello did provide assistance during the period leading up to the making of the complaint. Thereafter, he failed to give any response of substance to the requests made of him. In particular:
- (a) During the investigation of the complaint Mr Tomasello did not respond to questions asked of him. He did send a short email on 14 October 2014; but that email did not address the questions. He then did not respond to a narrower set of questions offered to him following his 14 October email.
 - (b) Mr Tomasello did not respond at all to the Notice of Disciplinary Breach issued 19 December 2014. The Notice advised that he was required to respond to it by 26 January 2015, and that failure to respond amounted to a Special Breach of the Disciplinary Regulation.
 - (c) Mr Tomasello did not attend the Disciplinary Hearing. He did send an email on 20 March 2015 in which he advised he would not be attending the hearing. The email also said that \$380,000 of the loan had been repaid. There was a follow-up email on 23 March 2015.
115. The FPA submitted Mr Tomasello failed to give reasonable assistance during the investigation of the complaint and also in response to the Notice of Disciplinary Breach.
116. The Panel acknowledges the assistance Mr Tomasello provided at the outset, but the Disciplinary Regulation requires reasonable assistance from a member at each formal stage of investigation into their conduct.
117. The Panel finds it proven that Mr Tomasello has committed a Special Breach within the meaning of clause 70 of the Disciplinary Regulation in that he failed to provide reasonable assistance during the investigation of the complaint. He failed to answer any of a range of questions asked of him. On the Panel's assessment it was reasonable for the FPA to expect an answer to the questions.
118. The Panel also finds it proven that Mr Tomasello has committed a Special Breach within the meaning of clause 70 in that he failed to provide reasonable assistance during the disciplinary proceedings as he failed to respond to the Notice of Disciplinary Breach.

What action should be taken in respect of Mr Tomasello

119. Clause 111(b) of the Disciplinary Regulation provides that where a Disciplinary Panel finds a breach proven, the hearing shall be conducted as far as possible as an inquiry into the member's conduct for the purpose of:
- determining whether the balance of the interests of the public, the financial planning profession and the community lie with:
- i. assisting the Member to understand, correct and rehabilitate any conduct found to be in Breach;
 - ii. sanctioning the member for that conduct for the protection of the community or the profession; or
 - iii. both i and ii.
120. The FPA submitted that the breaches of the Code were serious and for the protection of the public it was appropriate to sanction Mr Tomasello by expulsion from the FPA.
121. The FPA submitted the evidence demonstrated Mr Tomasello had no appreciation or understanding of the minimal ethical requirements to be a financial planner. In his last email, on 23 March 2015, Mr Tomasello said:
- I was always committed to the ethics of the FPA. It's a shame that no one pointed out either through my licensee or the FPA that LOANS should or MUST NOT be entered into with clients.
... where were you all when I should have been given some guidance before the event to these so-called professional norms?
122. The FPA was also concerned that Mr Tomasello appeared to leave open the possibility of returning to financial planning work.
123. A relevant consideration in assessing the appropriateness of expulsion is whether the member has an understanding of the proper conduct required.
124. It is also relevant to consider whether the member might seek to undertake financial planning work in the future. Expulsion is forward-looking and concerned about conduct in the future: *Re CFP Practitioner Member CRC 2013_1* at paragraph 9.6.
125. Mr Tomasello's statement in his email of 23 March shows a complete lack of understanding of the ethics he asserts he is committed to. It is an unsatisfactory response to breaches of the Code to assert that nobody informed him he could not borrow money. Compliance with the Code is both a continuing personal responsibility as well as a condition of membership. Upon application for membership of the FPA, and again upon applying for CFP status in 2002 Mr Tomasello declared he agreed to abide by the FPA Code of Ethics, Rules of Professional Conduct and FPA

Constitution. Upon the most recent renewal of his membership Mr Tomasello again acknowledged his agreement to be bound by the FPA Constitution and its requirements.

126. Since Mr Tomasello ceased to continue to engage with the FPA once the complaint and investigation processes were underway, the Panel has no basis for seeking to assist Mr Tomasello undertake any rehabilitative action; sanction is the only option.
127. The Panel finds that for the protection of the community and the profession expulsion is the appropriate sanction.
130. The FPA did not seek imposition of a fine against Mr Tomasello. The Panel notes that a fine is the only sanction that may be imposed against a member for a Special Breach.
131. However, the FPA sought payment by Mr Tomasello of its costs and expenses of the investigation and disciplinary proceedings.
132. The FPA has proven its case. It has been put to the time and expense of doing so. Mr Tomasello has not assisted in resolving the complaint and subsequent disciplinary proceedings. The Panel considers it appropriate to direct Mr Tomasello to pay the FPA's costs and expenses.
133. The FPA submitted publication of Mr Tomasello's name was appropriate in the circumstances.
134. The Panel notes that under the Disciplinary Regulation, publication of the member's name is not itself a sanction.
135. As the Panel understands clause 157 of the Disciplinary Regulation, the FPA is required to publish the name of the member where the Panel has determined that the member has committed a breach.

END OF REASONS