

FINANCIAL PLANNING ASSOCIATION

CONDUCT REVIEW COMMISSION

CRC 2009_1

**DETERMINATION
AND REASONS FOR DECISION**

The Principal Member (Name Withheld)

PANEL MEMBERS: *Professor Dimity Kingsford Smith (Chair)*
Ms Sandra Bowley
Mr Chris Benson

DATE OF HEARING: 24 September 2008

DATE OF FINAL DETERMINATION: 20 February 2009

PARTIES' REPRESENTATIVES: *Mr Ivan Middleton (FPA)*
Hearing Conducted in Absence of
Member and without their
Representation by their Choice

DETERMINATION AND REASONS FOR DECISION

I. SUMMARY OF DETERMINATION AND REASONS

The CRC finds that The Principal Member has breached various provisions of the FPA Constitution and FPA Ethics and Rules. It has come to this conclusion on the basis of uncontroverted evidence of failure by The Principal Members to assist FPA compliance personnel with the production of documents. The final determination is set out at the end of these reasons in section VIII and the sanctions the CRC imposes, in section IX.

II. THE COMPLAINT

2.1

This is a complaint by the Financial Planning Association (FPA) in its disciplinary capacity under its Constitution and Disciplinary Regulations. The complaint is referred to the Conduct Review Commission (CRC) on the motion of the FPA's Investigations Officer, as a result of an internal FPA referral from Mr Peter Thompson (Thompson) who is a senior compliance officer at the FPA. Thompson works in the Professional Standards section of the FPA, and was responsible for conducting a periodic compliance review of the financial services business of The Principal Member.

2.2

A breach notice was issued to The Principal Member. It was alleged that it had a case to answer under the FPA Constitution and FPA Code of Ethics and Rules of Conduct (FPA Ethics and Rules). The case to answer alleged breaches of the Constitution and Ethics and Rules as follows:

1.

In breach of paragraph 3.3 f of the FPA Constitution the member has committed offences under the FPA's Constitution in failing to supply material or information or assistance when requested on a number of occasions by FPA officers authorized to carry out compliance reviews or investigations. In particular failure to comply with requests made in letters from the FPA to The Principal Member dated 4 October 2007 and 24 October 2007, emails of 9 January 2008, 29 February 2008, 4 March 2008, 7

May 2008 and requests made during FPA field visit on 5 October 2007, and numerous phone calls.

2.

In breach of paragraph 3.6.3.1 of the FPA Constitution the member has committed offences under the FPA Constitution in failing to request third parties to make available information required by FPA officers eg third parties such as an external compliance provider or clients to whom The Principal Member may have issued a Statement of Advice.

3.

In breach of Rule of Conduct 127 The Principal Member has failed to cooperate with the FPA in all aspects of any authorised investigation or compliance review. Specifically they have failed to supply material or information or assistance when requested as particularized in paragraph 1 above by FPA officers authorised to carry out compliance reviews or investigations.

4.

In breach of paragraph 3.3 b and d of the FPA Constitution the member has committed offences by failing to comply with other requirements of the Constitution and by failing to comply with the FPA Ethics and Rules.

5.

In breach of paragraph 8 of the FPA Ethics and Rules The Principal Member has not ensured their conduct complies with the FPA Constitution. For particulars see paragraph 1 above and paragraph 4 above.

III. BACKGROUND TO THE COMPLAINT

3.1

The FPA publishes professional standards made by it, and binding on all its members, by virtue of the FPA constitution and regulations. Under clause 3.6 of the FPA constitution effective 24 November 2006, the FPA may conduct compliance reviews, and in the course of those reviews, may request a member to supply further information and documents. Thompson did conduct a compliance review and did request further documents from The Principal Member. He did this on a number of occasions both personally and by correspondence. In the

investigation phase, these requests were followed up by similar requests in writing from the Investigation Officer. The documents were not provided. Or if they were provided it is alleged they were completely insufficient.

3.2

Thompson provided a statement of the circumstances in which he came to refer the alleged non-compliance of The Principal Member to the Investigation Officer and hence to the CRC. Put plainly, Thompson states that The Principal Member has failed to provide him with documents crucial to showing that they are compliant with FPA professional standards.

IV. THE FPA's POSITION

4.1

The FPA's position is that under the constitution and regulations it is empowered to conduct compliance visits of its members, and to request information and documents. Relying on Thompson's statement, it asserts that the requested documents were not provided, despite the fact that nearly a year elapsed between the first requests and the CRC's hearing of this matter.

4.2

The FPA Investigation Officer has requested the expulsion of The Principal Member from the FPA because of the inadequacy of its compliance evidenced by the failure to provide four crucial documents:

1. compliance manual;
2. training and supervision guidelines and policies;
3. compliance guidelines covering the FPA's conflict of interest principles; and
4. compliance guidelines covering the FPA's code of practice in relation to alternate remuneration.

4.3

Up until the last week before the hearing The Principal Member also failed to provide a second statement of advice as required by Thompson. This was provided about a week before the hearing.

4.4

Two days before the hearing The Principal Member forwarded to the Investigation Officer some documents. Although their nature was not explained, it was assumed in The Principal Members' favor that these documents were an attempt to provide the requested compliance manual and the training and supervision guidelines. It is the FPA's contention that the form and content of the supplied documents are wholly deficient if this was The Principal Members' purpose. There seemed to be no attempt to provide the other documents still outstanding.

4.5

The Principal Member has provided no formal written response to the breach notice issued to them. As already described they have made some attempts to provide the requested documents. The Principal Member was given copious warning of the hearing, and The Principal Member's representative told the Investigation Officer on a number of occasions that he would attend in person.

4.6

On the day of the hearing The Principal Member did not attend in person. The Principal Member's representative was invited to attend by teleconference. The panel postponed the beginning of proceedings for 30 minutes to allow him to be ready to attend by phone. He sent word by a secretary that he was tied up all day on another telephone meeting and would not be able to attend the FPA hearing. At no time was there an attempt to request another representative to attend on behalf of The Principal Member.

4.7

The CRC panel proceeded with the hearing in the absence of The Principal Member and its representative.

V. THE PRINCIPAL MEMBERS' POSITION**5.1**

The Principal Member has not attempted in any way to respond to the FPA's allegations set out in the breach notice nor to make submissions in any form at the hearing. It is therefore difficult to know what the members' position is.

VI. RELEVANT LEGAL ISSUES AND RULES**6.1**

The FPA publishes professional standards made by it, and binding on all its members, by virtue of the FPA constitution and regulations. Under clause 3.6 of the FPA constitution effective 24 November 2006, the FPA may conduct compliance reviews, and in the course of those reviews, may request a member to supply further information and documents.

6.2

The constitution also provides that a member commits an offence for which sanctions may follow, if they do not assist with compliance reviews themselves, or request third parties who hold the information or documents to do so. These constitutional provisions are identified and paraphrased in section II (above). There is also a further series of constitutional offences that follow from failing to comply with the FPA's constitution itself, its Ethics and Rules and any other of its practice standards. The Ethics and Rules replicate

the FPA constitution by also providing that members must comply with requests from the FPA for assistance. These other rules are also set out in section II above.

6.3

Finally the disciplinary regulations adopted in July 2007 by the FPA Board, provide at paragraph 2.2 that the FPA may initiate a complaint if it believes a member's conduct justifies that action. This is in addition to the usual course of members of the public making complaints. This is the course that Thompson took, when The Principal Member's history of unreadiness for compliance visits and failure to produce documents despite multiple requests, became evident.

6.4

The only other legal question of note is that one of the statements of advice that The Principal Member did finally produce, was referable not to the period of audit, but to July 2008. Some of the panel members questioned whether it was appropriate to accept in satisfaction of Thompson's requests, a document that had been created since the date of the audit. After some discussion, it was concluded that since the Investigation Officer had indicated to The Principal Member that the document had been accepted by the FPA, that on this occasion the CRC would accept the document as being produced in satisfaction of Thompson's requests.

VII. OUTCOME AND REASONS

7.1

The evidence of Thomson and the Investigation Officer as to the breaches of requirements in the constitution, Ethics and Rules and practice standards of the FPA by The Principal Member is uncontroverted. The evidence of these breaches is clear, repeated and fully documented. The Principal Member has made no effort to respond in person, by representation or written submissions.

7.2

The CRC accepts that the Investigation Officer has received from The Principal Member attachments to two emails on the 22 September 2008, in response to his requests for further documents. These attachments in printed out form were presented to, and read by the CRC. There was no explanation accompanying the arrival of these attachments as to their nature and purpose. The CRC assumed in The Principal Members' favour that the attachments were an attempt to provide the compliance manual, and the training and supervision guidelines that had been requested.

7.3

The CRC practitioner members studied these documents carefully in an attempt to ascertain whether they were complying. The documents were so rudimentary (being in part barely more than templates) and so ill fitted for the

purpose of being a compliance manual or training supervision guidelines, that the CRC has concluded that they do not satisfy the requests made on The Principal Members to furnish documents.

7.4

No evidence was led by the Investigation Officer that requests had been made by Thompson that The Principal Members procure documents or information from third parties. Consequently, no breach is found of paragraph 3.6.3.1 of the FPA constitution.

7.5

Consequently, the CRC has concluded that The Principal Member has not met the case they have to answer, and has contravened provisions set out in the breach notice and repeated above in section II of these reasons.

VIII. FINAL STATEMENT OF DETERMINATION

8.1

For these reasons the CRC finds:

A breach of the FPA constitution

Clause 3.3.f

Clause 3.3.b

Clause 3.3.d

And no breach of

Clause 3.6.3.1

A breach of FPA Ethics and Rules

Rule 127

Rule 8

IX. SANCTIONS

9.1

After sending this determination and reasons to the parties in November 2008, the CRC has invited and received submissions on sanctions from the FPA and The Principal Member. It now directs that the following sanctions be imposed:

1. That The Principal Member be expelled from the FPA and that the expulsions be published in the Financial Planning Magazine;
2. That The Principal Member be fined \$3000 per offence;
3. That The Principal Member pay the FPA's costs of the hearing of this matter which are \$2378.20.