FINANCIAL PLANNING ASSOCIATION

CONDUCT REVIEW COMMISSION

DETERMINATION AND REASONS FOR DECISION

The Principal Member and individual Member (names withheld)

PANEL MEMBERS: *Professor Dimity Kingsford Smith (Chair)*
Ms June Smith
Mr James Cotis

DATE OF HEARING: 25 July 2008

DATE OF FINAL DETERMINATION: 20 February 2009

PARTIES' REPRESENTATIVES: *Mr Ivan Middleton (FPA)*
Ms Margaret Mote (BFA) Mr Richard Carter (BFA)

DETERMINATION AND REASONS FOR DECISION

I. SUMMARY OF DETERMINATION AND REASONS

The CRC finds that the Member did make a recommendation to the complainants to invest in the Hotboats boat restoration scheme. The panel also finds that the Member failed to make disclosures required by the FPA Ethics and Rules. The CRC finds the Principal Member to be responsible for the conduct of its authorized representative, the Member. It also finds that the Principal Member failed to maintain an effective system of supervision of the Member' recommendations to clients, even at the reasonableness standard The final determination is set out at the end of these reasons in part VI/I and the sanctions the CRC is minded to impose, in part 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 a complaint received by him from a client of Mr. S, a member of the FPA. The complainants complained that he received defective financial advice from Mr. S. Mr. S was at the time an authorized representative of BFA, a principal member of the FPA and the holder of an Australian Financial Services License.

2.2 After investigation and correspondence between the FPA, Mr. S and BFA it was alleged that Mr. S had a case to answer under the FPA's Code of Ethics and Rules of Conduct (FPA Ethics and Rules). I t was also alleged that BFA by the conduct of its representative Mr. S, and on its own account breached the FPA's Ethics and Rules. The case to answer alleged breaches of the Ethics and Rules as follows:

By Mr. S

2.3 **1.** In breach of Rule of Conduct 103 Mr. S failed to advise the complainants of

(a) the identity of the principal member BFA and

(b) the nature of services

(c) the method of remuneration

(d) access to complaint handling mechanisms

(e) the nature and extent of any significant financial relationship or material conflict of interest.

2. In breach of Ethic 1 Mr. S failed to observe high standards of honesty and integrity in the provision of financial services in particular failed to reveal to the complainants the nature and extent of his financial relationship and material conflict of interest.

3. In breach of FPA Ethics and Rules106 and 107 Mr. S failed to either orally or in writing to disclose any of the matters in rule 106 paragraphs (a) to (d) inclusive despite making a recommendation that the complainants invest.

4. In breach of FPA Ethics and Rules 110 Mr. S failed to develop any suitable financial strategy or plan for the complainants before making his recommendation that they invest.

5. In breach of FPA Ethics and Rules **Ill** Mr. S failed to provide any explanation of the nature of the investment risks involved in terms that the client is likely to understand.

6. In breach of Rule of Conduct 112 Mr. S failed to ensure his recommendation to invest was given or confirmed in writing as soon as practicable.

7. Repeating paragraphs 3, 4 and 5 above, in breach of Rule of Conduct 113 Mr. S failed to take reasonable steps to place the complainants in a position to comprehend the recommendation and the basis for the recommendation to invest.

By BFA

2.4 **1.** Between 1 January 2004 and 27 October 2006 BFA had Mr. S as its authorized representative;

2. By force of FPA Ethics and Rules 132 the conduct of its representative Mr. S set out in paragraphs 1-7 above shall be treated as the conduct of BFA;

3. In breach of FPA Ethics and Rules 135 BFA failed to maintain an effective system of supervision of the activities of its representative Mr. S and the recommendations made to clients. In particular it failed to be effective so that Mr. S's recommendations related only to the conduct of BFAs financial planning business and that Mr. S complied with FPA Ethics and Rules 105. They also failed to supervise effectively so that Mr. S's conduct was in accordance with the rules alleged to have been breached in paragraphs 1-7 above.

2.5 The CRC held a hearing of these allegations on 25 July 2008. At the hearing the CRC took submissions and evidence from the FPA through its investigation officer. The FPA presented evidence in a folder of exhibits numbered 1 to 30 (FPA exhibits). Mr. F gave evidence by a statement and personally.

2.6 The CRC was also greatly assisted by the written submissions of BFA prepared by David Pritchard SC (Pritchard submissions) supported by three folders of exhibits numbered 1-39 (BFA exhibits). Since the hearing the CRC has requested and received additional documents from BFA in two bundles covered by letters dated the 28 July 2008 and the 30 July 2008. These will be referred to as BFA exhibits identified by the relevant one of those two dates. The CRC is also grateful for the assistance given it by Ms. Margaret Mote and Mr. Richard Carter who both appeared personally for BFA and made submissions on BFAs behalf and assisted the CRC with BFAs evidence.

2.7 Mr. S represented himself before the CRC and participating by phone also gave evidence.

2.8 There is a typed transcript of the entirety of the proceedings which will also be referred to in these reasons. The transcript is in two parts which will be referred to as 'transcript' and 'additional transcript' and relevant page numbers.

III. BACKGROUND TO THE COMPLAINT

3.1 At sometime about a decade before these proceedings Mr. S in the course of his business as an accountant and tax advisor acquired Mr. F and his wife Mrs. F (the Fs) as clients. Mr. S assisted Mr. F with his annual tax return each year.

3.2 While still carrying on his accounting and tax advisory business, Mr. S became an authorised representative of BFA at sometime in 2003, and this was formalised in an agreement operating from 11 November 2004. So authorised Mr. S added the provision of financial planning to the services he already offered his clients through his company 'Mr. S and Partners Pty Ltd Trading as TFS'.

3.3 In late 2005 Mr. S and Mr. B became business associates and began to meet with Mr. Z a boat builder. They discussed the possibility of purchasing and bringing to Australia and repairing and restoring for sale, boats which had been damaged in US waters, and written off for insurance purposes. The Hotboats Unit Trust with Hotboats Australia Pty Ltd as its corporate trustee (Hotboats) was established as the vehicle for doing this. The MG Trust was constituted with Mr. S and Mr. B as trustees, and it was allocated 35% of the units in Hotboats. Hotboats began to acquire vessels one of which was the Max I. One of Mr. S's accounting and financial planning clients, Ms. H, invested with Hotboats at some time before mid-2006.

3.4 **It** is not disputed that in May 2006 the Fs having sold their house, had $65,000 to invest. Nor is it disputed that Mr. F approached Mr. S for advice about how to invest the amount, so that they might reinvest the funds in another house at the end of 18 months. Initially Mr. S gave Mr. F general advice that he should keep the funds in a term deposit or cash management account, the term of the investment (18 months) being too short for most other investment alternatives. Then he mentioned Hotboats as an investment possibility. Initially the Fs were not interested because the Hotboats investment period was too long. But a subsequent

call by Mr. S resulted in the Fs investing $65,000 in a Hotboats renovation of a vessel called the 'S-Boat'. In 14 June 2006 Mr. F paid over $65,000 to Hotboats (by direction to Inter-Pacific a cargo carrier) and on 16 June 2006 Mrs. F signed the 'Development Agreement' on their behalf.

3.5 The restoration work on the 'S-Boat' is still incomplete, and the vessel remains unsold. The Fs have complained to the FPA because they are still unable to realise their investment. They complain that they were given defective financial advice by Mr. S and that none of the required disclosures were made to them by him. Particularly that Mr. S was to receive benefits from Hotboats arising from his business connections with it. Mr. S did tell Mr. F that he had invested in Hotboats himself in relation to the renovation of a vessel called the Max II.

3.6 Mr. S was an authorised representative of BFA from late 2003 until late 2006. **It** is not disputed that the terms of the representation at the relevant time were set out in an agreement of 11 November 2004. **It** is also not disputed that preceding and during that agreement Mr. S was initiated into, trained by and monitored under the BFA compliance program. BFA used external auditors who are commonly used in the Australian financial planning sector, first Integratec then Tribeca and later Paragem, as external auditors of Mr. S and his financial planning business. This was done annually in November 2003, November 2004 and November 2005. There was no 2006 external audit because the representative agreement was ended and Mr. S became the representative of another AFSL holder, at the end of October 2006.

3.7 Financial planning files were selected by the external auditor and reviewed. Demerit points were accumulated for each deficiency in the form of the record keeping and substance of compliance with legal and regulatory requirements, found in the files. The results of these audits were passed on to the BFA Compliance Committee if the scores were high. Mr. S's external audits did tum in medium to high scores. The Compliance Committee directed that a BFA representative follow up with Mr. S on the deficiencies identified by the auditor. This was done personally at Mr. S's business premises, mostly by a member of the Compliance Committee, Andrew Andrikopoulos. BFA also required Mr. S to attend training held by the external auditors each year for all authorised representatives. There the auditors identified the ten leading deficiencies identified over all the authorised representative audits, and how they should be redressed.

3.8 Of particular relevance to this complaint are the following issues:

1. Whether Mr. S made a 'recommendation' or a 'mere referral' to the F;

2. Whether Mr. S received any remuneration, had any material conflict of interest or received any other pecuniary or non-pecuniary benefit reasonably capable of influencing the making of a recommendation which should have been disclosed;

3. Whether a principal member is always liable for the conduct of its authorised representative under the FPA rules.

4. Whether BFA maintained an effective system of supervision of all Mr. S's activities.

IV. THE FPA's POSITION

A. In Relation to Mr. S

4.1 The FPA makes three main allegations:

1. That that as well as being accounting clients, the Fs were Mr. S's financial planning clients and that he recommended they invest in the Hotboats restoration of the vessel 'S-Boat';

2. That Mr. S failed to disclose to the Fs that he was a beneficial owner of units in the Hotboats Unit Trust and an agent of the trust;

3. That Mr. S failed to make other disclosures required by the FPA Ethics and Rules when a recommendation to invest is given.

That there was a 'Recommendation' to Invest in Hotboats.

4.2 It is not disputed that when approached by Mr. F in May 2006 Mr. S gave the Fs general advice to keep the $65,000 in a term deposit or cash management account. However, during questioning of Mr. S by Ms Mote (transcript p 15) it became clear that BFAs and its representatives have an internal policy that they do not take financial planning clients who have less then $100,000 to invest, and who have a time period for investment of less than 5 years. Mr. F gave clear evidence that it was at the hearing that he first knew of this limit on Mr. S's ability to advise him (transcript p 27).

4.3 Relying on the evidence of Mr. F the FPA alleges that in the same conversation in May 2006 Mr. S went further and told Mr. F about the Hotboats restoration project, and that Hotboats were looking for investors. The FPA alleges that Mr. S told Mr. F:

'The potential profit will far exceed that of a cash management account and within your time limit of 18 months.' (Transcript p10)

4.4 A few days later Mr. S and Mr. F visited the boatyard and viewed a vessel being restored by Hotboats. They met a man involved in the Hotboats restoration project. That man said there were no boats currently under restoration that would meet the F's 18 month time frame. As they left the boatyard Mr. F's evidence is that Mr. S said to him:

'You can always wait longer to buy a house. An opportunity like this may not present itself again.' (Transcript p11)

Because of the mismatch of time frames, after discussion the Fs decided not to go ahead with the Hotboats investment.

4.5 Mr. F gave evidence that about 9 June 2006 he was rung by Mr. S who said

'I have been told by Hotboats that another boat has just docked in Melbourne. It is called the 'S-Boat'. An investor has been short of funds and pulled out. This is an opportunity for you to invest. The investment is within your 18 month time-frame.' (Transcript p 10).

4.6 It is not disputed that the Fs then decided to invest and that on 14 June 2006 Mr. F paid over $65,000 to Hotboats (by direction to Inter-Pacific a cargo carrier) and on 16 June 2006 Mrs. F signed the 'Development Agreement' on their behalf. It is also not disputed that at this time when he contacted Mr. S for advice about who should sign the 'Development Agreement' that Mr. S advised that it should be Mrs. F.

4.7 The FPA asserts that its version of events is corroborated further by an email. The email was sent 9 June 2006 written by Mr. S to his business associate in Hotboats Mr. B. The email was sent very shortly before the Fs made their investment on 14 June 2006. The relevant parts of the email say:

'Mr. F is my client who I have known for a long time and has 70,000 to invest... He has an 18 month timeframe.' (Transcript p 12/FPA Exhibit 4)

Mr. S agreed that this email had been written by him (Transcript p 20).

4.8 Finally the FPA rests its case against Mr. S on the fact that Mr. F saw Mr. S as a general resource for financial advice on all matters, and had no idea that some of the time that advice was being given as part of Mr. S's tax practice and other times, as part of his financial planning practice. (Transcript p 24-31) The Fs had never made any investment of any substance before, and went straight to Mr. S for advice as soon as they did have funds to invest. Mr. F knew that Mr. S was a financial adviser (he had visited his offices where this was displayed) but as he said of his conversations with Mr. S:

'there was no separation of ...right this is your tax stuff, we've finished with that now, we're going to move on to financial planning situation, I'm going to put my [financial planning] hat on. There was nothing to that respect.' (Transcript p 29)

To him the conversations he had with Mr. S were undifferentiated and all for seeking a variety of financial services, including the FPA alleges investment advice.

4.9 On this evidence as to the character and context of the communications with Mr. S the FPA contends that the Fs were financial planning clients of Mr. S and that he made an investment recommendation to them.

That Mr. S Failed to Disclose 'Remuneration•.{or} any other benefit reasonably capable of influencing the making of the recommendation'

4.10 The second major allegation made by the FPA is that Mr. S failed to tell the complainants in writing that he was entitled to remuneration and other benefits that were capable of influencing the recommendation the FPA alleges he made to the Fs.

4.11 The evidence shows that in November 2005 Mr. S, Mr. B and Mr. Z (a boat-builder) began conversations about a business of renovating damaged boats and selling them at a profit. An email from Mr. B to Mr. S on 15 November 2005 records a meeting that Mr. B had with Mr. Z in which the establishment of trusts to undertake the business and distribute profits was discussed. (FPA Exhibit 17). The FPA contends that Mr. S and Mr. B had developed a business plan which was put to Mr. Z at that meeting, the essence of which was that through trusts Mr. S and Mr. B would share 35% of the profits of what became Hotboats. For these entitlements they would raise $5 million (though this seems to have been reduced subsequently to $2 million) from investors who were to provide the capital to cover the costs of the acquisition, shipping to Australia and repair of the vessels.

4.12 Mr. S's evidence is that Hotboats asked him to arrange the set up of the unit trusts which he did, and they were all executed on 1 February 2006. The Hotboats unit trust (FPA Exhibit 6) has Mr. S as one of the trustees of the MG Trust which owned 35% of the units in the Hotboats unit trust. Mr. S gave evidence that 'MG' stood for Mr. B and Mr. S. In turn the MG Trust (FPA Exhibit 7) had MJ & MP Forrest Investments Pty Ltd as a holder of 50% of the units. That company had Mr. S as the sole director and shareholder. Finally MJ & MP Forrest Investments Pty Ltd held the units in the MG Trust on a further trust – the ANED Discretionary Trust. In a conversation with the FPA's investigation officer (FPA Exhibit 9) Mr. S said that the ANED Discretionary Trust had never been constituted.

He said 'The ANED units belong to me.'

We take this to mean that the units in the MG Trust which are held on trust by MJ & MP Forrest Investments Pty Ltd are under Mr. S's control, because he is the sole director and shareholder of that company. It is the FPA's contention that this sequence of trusts put Mr. S in a position to control the final destination of 17.5% of any profits distributed by the trustees of Hotboats.

4.13 It is also the FPA's contention that Mr. S acted as an agent for Hotboats. It was in this role that he was to raise funds from investors to justify the issue of the units in the Hotboats unit trust to the entities just listed above. The FPA relies on a number of pieces of evidence in support of this contention. It first relies on FPA Exhibit 13 which sets out a diagram of the Hotboats business structure and associated entities, and is dated 24 November 2005. The sequence of trusts described above seems to have been established largely in correspondence with this document. The

document sets out that the MG Trust will be responsible for a number of business matters, including relevantly 'finance and insurance'. In particular the document says:

'MG unit allocation 35% of current and future business where MG involved in the above functions. Performance criteria raise $2 m by 31 December 2007. Allocation of units with buy-back clause of$1 for each unit qualification has not been met. i.e. 1 unit= $57,142 of funds raised.' (FPA Exhibit 13)

4.14 The FPA's contention is also corroborated by Mr. S's evidence that for a very short period he was providing accounting services to Hotboats. It is supported by Mr. S's evidence (transcript p 18, 20-21) that one of his other accounting and financial planning clients, Ms. H invested in the boat renovation project. This was in early 2006. On 18 April 2006 there was a further email from Mr. B to Mr. S (FPA Exhibit 20) in which Mr. B is asking for a meeting in order to consider business issues of the type set out in the list in the document dated 24 November 2005. The list of business issues mentioned in the email includes 'further funding requirements.' Mr. S's reply to the email takes no exception, and in no way suggests it is remarkable that Mr. B is seeking a meeting with him about these issues. Then on 13 September 2006, after the Fs had invested, there is an email from Mr. B to Hotboats personnel recording a meeting with Mr. S in which the raising of finance was again discussed. Mr. S explained the contents of this email (transcript p 42-44) as being a discussion about the organization of finance that he had suggested. He had suggested using a boat as security for a loan from Macquarie Finance (leasing). The FPA argues that the cumulative effect of this evidence shows that Mr. S had a business role at Hotboats that he was to be remunerated for by holding units in the Hotboats unit trust through trusts associated with him.

4.15 Finally, it is also clear that Mr. S had invested a substantial amount of his own money in the boat restoration enterprise including that of the Hotboats Unit Trust. Mr. S gave evidence (transcript p 56-63) that he made a number of payments that were used for operating funds, but that they were to be allocated towards an investment in a vessel called the Max II. It seems from that evidence that he had a material personal interest in Hotboats and its associates' activities because of delay with the vessel in which he had invested. In particular he had an interest in vessels in the boat-yard being completed (for which funds were required) so that work could begin on his vessel.

4.16 Mr. S's own evidence is (transcript p40) that he did not tell the Fs that he had a business interest or any material benefit coming to him from Hotboats. Mr. F has consistently said that Mr. S said nothing to him about it. Mr. S did tell the Fs that he had invested in a vessel, but did not tell them that he already entertained doubts about the ability of Hotboats to honour its commitments.

That Mr. S Failed to Make a Number of Other Disclosures to the Fs.

4.17 It is not contested that Mr. S failed to make other disclosures to the F which the FPA alleges were required under the FPA rules.

B. In Relation to BFA

4.18 The FPA makes two main allegations against BFA:

1. That under Rule 132 BFA is responsible for the conduct of Mr. S as its representative. The significance of this is that in determining whether the principal member has complied with the FPA Ethics and Rules, the conduct of the representative shall be treated as if it were that of the principal member.

2. That BFA has failed to maintain an effective system of supervision of Mr. S's activities as required by Rule 135.

4.19 The FPA argues that on the words of Rule 132, BFA is responsible for any conduct which the CRC finds is a breach of FPA Ethics and Rules by Mr. S. Its position is that Mr. S was authorised by BFA to conduct financial planning business as a representative under BFAs Australian Financial Services Licence, and under the authorised representative agreement entered by both parties dated 11 November 2004.

4.20 The FPA accepts the evidence that BFA had no knowledge of the Fs or that Mr. S had suggested they invest in the 'S-Boat', an investment not on BFAs authorised products list. It also accepts that BFA received no direct financial advantage, such as commission, from the transaction involving Mr. S and the Fs. It nevertheless maintains that Mr. S gave financial planning advice to the Fs which related to the conduct of BFAs financial planning business and that under the FPA Ethics and Rules the acts of Mr. S should be vicariously attributed to BFA.

4.21 In relation to Rule 135 the FPA alleges that there were deficiencies in the supervision of Mr. S's activities by BFA. The allegation is that there were significant breaches of the FPA Ethics and Rules by Mr. S, and that these occurred because of the failure of BFA to maintain an effective system of supervision of Mr. S. In particular there were deficiencies in the system of supervision of authorised representatives that had more than one professional designation – financial planner as well as accountant or tax adviser – and that because of FPA Ethics and Rules 135 and especially since the recent decision in *Newman v Financial Wisdom* [2005] VSCA 110; [2004] VSC 216 discussed below, BFA should have been more alive to the need to improve supervision in this area.

V. THE MEMBER'S POSITION

A. Mr. S Denial that a recommendation to invest was made.

5.1 Much of the evidence given by Mr. F is not disputed by Mr. S. Although he agrees he told Mr. F about Hotboats and its investment opportunity, he denies he said the words:

'I probably shouldn't be telling you this…' He also denies he said 'The potential profit will far exceed that of a cash management account and within your time

limit of 18 months.' (Transcript p14)

5.2 While he does not deny that he told Mr. F that he had invested in Hotboats, he says that F's recollection of the details of the boat is incorrect. Mr. S says he invested in the Max II and that it was never at the Chelsea boat-yard. He does accept that the Max I, which was likely at the yard when both visited, was supposed to be very like the Max II in which he did invest. Mr. S agrees that the substance of the conversation described by Mr. F as they left the boatyard is correct. (Transcript p16)

5.3 Mr. S accepts that shortly after the visit to the boat-yard, he was contacted by his Hotboats business associate Mr. B and asked to get in touch with the Fs to see if they were still interested in investing. Mr. S also accepts the accuracy of Mr. F's evidence about the subsequent phone call they had on about 9 June when Mr. S phoned to relay the information about the arrival of a new vessel called 'S-Boat', which would be restored and sold within the F's investment time frame. He disputes only paragraph **1**0 (d) of F's statement in which he is alleged to have said

'This is an opportunity for you to invest. The investment is within your 18 month timeframe.' (Transcript p17)

5.4 More generally Mr. S presented his role not as an adviser to the Fs but as an introducer or 'middle-man'. He described many aspects of his business in which he referred clients to professionals and other service providers, some on the basis he would be paid for the referral (e.g. mortgage broking) some on the basis that he would not – a mere referral. A significant and recurring portion of Mr. S's evidence was elaborating the referral aspect of his business activities. He gave evidence that he was merely the go-between in introducing F to Hotboats and to Mr. B. He said that he introduced another of his tax clients who was also a financial planning client, Ms. H, to Hotboats and she made an investment as well. That investment has also been the subject of dispute and Mr. S gave evidence that litigation about the investment has recently been settled.

5.5 In short, Mr. S's position is that the Fs were tax clients not financial planning clients. He asserts that he did not give them financial advice, he only referred them to Mr. B and Hotboats, and that the Fs invested in the Hotboats boat renovation project on their own initiative. As a result, Mr. S's position is that he never gave the Fs financial advice, and that he had no obligation to make any disclosures to them, including about his own commercial connections with Hotboats. He accepts that because of this view he made none of the disclosures required by the FPA Rules.

Denial that he Failed to Disclose 'Remuneration•••[or any other benefit reasonably capable of influencing the making of the recommendation'

5.6 Mr. S's primary response to the allegation that he failed to inform the Fs about his business connection with Hotboats was that 'Nothing was ever set up.' (Transcript p36). He considered that the failure to complete the formal execution of documents such as the unit certificates for the MG Trust meant that nothing was effective. This elevation of the formalities of documentation and implementation of the

Hotboats business structure was repeated in relation to absence of stamping, establishment of bank accounts and so on.

5.7 As well Mr. S gave evidence that although he had been involved in early negotiations about the business structure set out in FPA Exhibit 13 dated 24 November 2005, and in particular the $2 million fundraising target, that by late January 2006 he had decided that he did not want to be involved in the Hotboats business. (Transcript 36-42). At one point he gave evidence that the fund raising conditions did not arise until around the time of the execution of the trust deeds, 1 February 2006. He said it was the late appearance of these conditions that caused him not to complete some of the formalities for the trusts and is evidence of his withdrawal from his business arrangements with Hotboats. Because of this withdrawal he says, he had by May 2006 no existing business connection with Hotboats to disclose to The Fs.

5.8 Mr. S freely gave evidence that he had incentive to be involved in the finances and management of the Hotboats project to promote the transport to Australia of the boat he had invested in, expedition of repairs of other vessels, so that his could be moved into the boat-yard, worked on and sold. (Transcript p43)

B. BFA

Denial That the Conduct of Mr. S Should be Attributed to BFA Under FPA Ethics and Rules 132.

5.9 BFA argued on several bases, that the conduct of its representative Mr. S should not be attributed to it as Principal Member. First it argued that for the conduct of Mr. S to be attributed to it, it was necessary that the conduct involve a 'financial product' as defined by the Corporations Act. The essence of the argument seems to be that the FPA Ethics and Rules should be read down to the same compass as the Corporations Act, and that BFAs are not liable for conduct effecting transactions not the subject of 'financial products' so defined. The investment in the 'S-Boat' it is implied, is not an investment in a 'financial product' and BFA is not liable for Mr. S's behaviour in relation to it. This is primarily a legal argument and we deal with it in section VI of these reasons.

5.10 The second and related reason given for resisting attribution of Mr. S's conduct to BFAs is that the transaction with the Fs was not that 'which relates to conduct of the Principal member's financial planning business' in FPA Ethics and Rules 132. This too, is primarily a legal argument and we also deal with this further in section VI below. BFAs argues in the Pritchard submissions (p 7-9) that the Hotboats investment is an investment as 'part owner' in a boat and not an 'interest in a managed investment scheme' that required registration and therefore not a 'financial product'. The argument seems to proceed further that not being an investment in a 'financial product' it is not within BFAs Australian Financial Services Licence, and consequentially not one 'which relates to conduct of the Principal member's financial planning business.'

5.11 The third reason BFAs give for arguing that the conduct of Mr. S should not be attributed to it is that it is not right that a Principal Member be should be vicariously liable for the conduct of an authorized representative in disciplinary proceedings. This seems to be an argument that while there is room for civil vicarious liability, the proceedings brought by the FPA have a character that makes it inappropriate to impose vicarious liability.

5.12 BFAs argue that in principle that they should not be vicariously liable for conduct over which they could not, despite 'impressive, thorough and effective' compliance arrangements (Pritchard submissions p 16) for supervision of Mr. S, have any knowledge of or control over. It is not disputed on any side that BFAs had no actual notice that one of its representatives was making recommendations to clients of interests in the Hotboats scheme. It is also not disputed that BFAs received no commission for the sale of this investment, nor that the investment would ever have made it onto BFAs list of authorised investments.

5.13 Although it is not elaborated in any way, the language of the Pritchard submissions in some places suggests that BFA should not be vicariously liable for Mr. S's conduct because the CRC proceedings and sanctions are penal in quality. The Pritchard submissions use the term 'offence' throughout to refer to contraventions of the FPA Ethics and Rules. At one point the submissions speak of witnesses being 'compelled' to attend (Pritchard submissions p4). This point was made more explicitly at the hearing by Ms Mote for BFA (transcript, p 8). Once again, this point depends mostly on a legal analysis, and we address this question too, in section VI below.

B. Denial That BFA Failed to Supervise Mr. S Effectively.

5.14 An important legal argument about the interpretation of FPA Ethics and Rules

135 which also applies to FPA Ethics and Rules 103, has to be considered at the outset of dealing with this issue. This is whether the words of both rules should be interpreted to allow a reasonableness standard or objective standard related to industry practice to apply. The words of FPA Ethics and Rules 135 require a Principal member to 'maintain an effective system of supervision'. Should that be interpreted to require a Principal member to 'maintain a *reasonably* effective system of supervision'? At p18 of his submissions Mr Pritchard argues along these lines in relation to FPA Ethics and Rules 103. That rule requires that a Principal member 'shall ensure that prospective clients' receive certain disclosures. He argues that FPA Ethics and Rules 135 should read that a Principal member 'shall *do all things reasonably necessary to* ensure' that clients receive the required disclosures. As this is primarily a legal argument, as before we deal with this in section VI below.

5.15 BFA brought a great deal of evidence to demonstrate that it had created, implemented and continuously maintained a system to supervise Mr. S effectively. It brought some evidence particularly in an attempt to show that it had been alive to the difficulties of supervising a representative who ran several businesses related to financial matters (tax and accounting) as well as being a financial planner. In particular it pointed to BFA Exhibit 17 where in the course of an external audit the auditor noted in November 2003 that 'The advisor colour codes all financial planning files purple as he also runs an accounting business.' However

in the external audit report of 2005 (BFA exhibit 19 p10) the auditor remarked 'The accounting and financial planning business share client data and we have not cited a specific authorisation sought from the client in this regard.' This suggested to the panel that the colour coding of files had broken down, or that Mr. S had moved to an online system, where this segregation of client information was not continued.

BFA evidence discussed the possibility that this was occurring in a software program called 'COIN' but otherwise did not have a response to this circumstance when it was pointed out. (Additional Transcript p14).

5.16 The 2003 external auditor noted that 'The adviser used the letterhead of the Licensee, but did not use the Licensee's business card.' See also questioning about this by the panel (transcript p 22 and additional transcript p 4-5). In response BFA produced a series of emails with Mr. S dated March 2004 (BFA exhibit under letter 28 July 2008) showing a number of exchanges approving letterhead and business cards for Mr. S's financial planning business showing the Licensee's name and contact details. The same auditor remarked:

'The signage was photographed. The adviser was unable to produce a copy of the relevant approval, saying the sign had been there for a long time and he had not sought approval' BFA exhibit 17, p3).

Again in 2004 the auditor remarked 'It was noted that the Licensee details were not present on any signage' (BFA exhibit 18 p2). And in the November 2005 report the auditor remarked again:'...on the front door and office doors. There is no mention of the Licensee on these signs or the one in the foyer.' (BFA E xhibit 19 p3). In that report the auditor also noted that in relation to Mr. S's financial planning business card 'The latter did not refer to the Licensee. We understand this has been approved by the Licensee.' (p3)

5.17 While there was evidence that part of BFAs template of documents given to representatives included a referral agreement there did not seem to be systematic review of referrals in external audits – in 2003 the audit referred to these, though in a roughly contemporaneous 'BFA Adviser Compliance Questionnaire' at question 5.11 Mr. S answered 'No' in response to the question 'REFER CLIENTS to some other party'. In 2004 the external audit was silent about referrals, and in 2005 there is again mention of referrals (BFA Exhibits 17-20). In that report the auditor noted:

'The only referral arrangements in place are those which occur between the businesses that Mr. S is involved in.' p2.

Yet as we have noted already, Mr. S gave evidence that he had many other referrals arrangements in place, including one with mortgage brokers. Eventually the panel was left wondering whether BFA had a policy about referrals which flowed into the construction of the external audit questionnaires (Additional transcript p10).

5.18 BFA brought evidence to show Mr. S received training by BFA including in relation to a general understanding of the statutory provisions and regulations under the Corporations Act. This training included how to identify when an accountant is giving financial advice and must either hold an Australian Financial Services Licence or be an authorised representative of such a Licensee (see Pritchard submissions p 15 and BFA exhibit 36). BFA also brought a lot of evidence about its system of supervision of all representatives' activities, and argued that this was effective.

5.19 Prompted by questioning from the panel, the degree of effectiveness centred on the external auditing of representatives' businesses, and BFAs follow-up on those audits. BFA provided a helpful account of this in its letters to the CRC dated 28 and 30 July 2008. These provided helpful perspective and additional understanding of the significance of the external audits done of Mr. S's business in November 2003,2004 and 2005 and provided at BFA Exhibit 17-20. It also located the external audits in the more general compliance system operated by BFA described briefly in Part III above, and elaborated in the Pritchard submissions at p10-17.

5.20 Except for November 2004 when Mr. S's external review obtained a medium score (which did not merit further discussion by BFA), Mr. S's external reviews in November 2003 and 2005 received high demerit scores and warranted further review. In both cases BFAs compliance staff met with Mr. S to review the scores and explain how Mr. S's business could be more compliant in future. In both 2003 and 2005 that review resulted in the scores from the initial audit being adjusted down so that Mr. S gained a medium score in both 2003 and 2004, but still retained a high score in 2005. BFA seems to have intervened for Mr. S with the external auditors, and been satisfied that their audit was harsh. A further review in 2006 of Mr. S's files audited in 2005 found a surprising discrepancy between the notes of the auditor (taken in November 2005) and the condition of the files when reconsidered in 2006. Then it was found many of the defects noted by the auditor were not present. (Email thread beginning 05 July 2006 Andrikopoulos to Paragem under BFA letter 28 July 2008 to FPA).

5.21 While presenting much evidence about its system of supervision, BFA asserted in the Pritchard submissions and at places in the transcripts, that Mr. S had 'gone on a frolic of his own.' That the conduct was not BFAs responsibility in the sense that they could not have done anything more to make their supervision more effective. Indeed, at a couple of points in the hearing, BFAs representatives asked the CRC panel 'What more do you say we could have done to supervise Mr. S more effectively?'

VI. RELEVANT LEGAL ISSUES AND RULES

Is the CRC entitled to deny members legal representation at the hearing of disciplinary proceedings?

6.1 The Constitution of the FPA provides at clause 3.5.1 that the Board of the FPA shall have power to make Disciplinary Regulations 'in relation to the handling and resolution of Complaints and Disciplinary Procedures'. On 17 July 2007 the FPA Board made the 'FPA Disciplinary Regulations 2007' (Disciplinary Regs 2007) one effect of which is to establish the CRC. Clause 9.4 of the Disciplinary Regs

2007 provides that:

'(a) Unless the Conduct Review Commission Disciplinary Panel determines otherwise, a party to Conduct Review Commission Disciplinary Panel proceedings is not to be legally represented in the proceedings.'

6.2 A companion clause in the Disciplinary Regs 2007, clause 9.6, directs the CRC to carry out its functions 'expeditiously and with as little formality as possible', to 'follow the principles of procedural fairness' and frees the CRC from the rules of evidence and permits it to 'inform itself on any matter as it sees fit.'

6.3 In short the CRC is given considerable freedom to set its own procedure, and rely on evidence of any reasonably probative type. It must observe procedural fairness, but the Disciplinary Regs 2007 make it clear that does not usually include according parties legal representation.

6.4 The CRC did not determine to allow BFA to be legally represented. Mr. S did not apply to be legally represented. Although some of the matters raised by this case are complex the CRC considered that an organisation such as BFA could be represented by one of its senior officers or management. In cases where similar member organizations have faced allegations they have been represented by a compliance officer who usually has experience in representing their organization in proceedings like those of the CRC (e.g. ASX Disciplinary Tribunals). There is nothing to stop such an officer from seeking legal advice in deciding what evidence to bring to the CRC, and in developing arguments to refute the FPA's allegations. Indeed, it is clear that is exactly what BFA chose to do. The CRC has accepted and addressed in these reasons many arguments and much evidence set out in the Pritchard submissions and the supporting BFA Exhibits. The CRC is grateful for the assistance given by these submissions and evidence.

6.5 A review of the Australian case law on whether there is a right to legal counsel in the disciplinary proceedings of private tribunals quickly demonstrates that there is no such right (see for example JRS Forbes *Justice in Tribunals* (2006 Federation Press) at 162-165). Most of the decisions coming to this conclusion were in cases where the constituting regulations were silent as to whether legal representation was allowed. In the case of the CRC the Disciplinary Regs 2007 are not silent. They expressly reject legal representation of the parties in the normal course, leaving it up to the CRC deviate from that course if there are unusual and extenuating circumstances where justice may not be done without legal representation. This case does not present those circumstances, and in any case the CRC has allowed lengthy written submissions and evidence prepared with the assistance of legal counsel to be admitted.

6.6 A final word on the CRC's procedures and satisfying the principles of procedural fairness. **I**t is the CRC's practice to send to the parties the determination and supporting reasons it is minded to publish. That gives all parties an opportunity to make final written submissions mostly on sanctions, but including those circumstances where a party thinks corrections are necessary or they have not been accorded procedural fairness.

6.7 In summary, the CRC is entitled to refuse legal representation to parties at its hearings. It is pleased to accept the assistance of written submissions and evidence prepared with legal advice. But unless the circumstances are most unusual it is directed to refuse, and will not determine to allow, legal representation.

Is it necessary to have a 'financial product' before the FPA Rules and Ethics apply?

6.8 In their written submissions prepared by Mr Pritchard, BFA argues that it is necessary for the complaint to concern a 'financial product' before the FPA Ethics and Rules can apply and, consequently, for the CRC to have jurisdiction over this matter. By 'financial product' the Pritchard submissions mean that term as defined in sections 762A, 763A and 765A of the Corporations Act.

6.9 By contrast the FPA Ethics and Rules do not restrict their operation by reference to such a term. Instead the FPA Ethics and Rules demonstrate variable scope, depending on their subject matter. So for example, FPA Ethics and Rules 101 contains a wide prohibition on members engaging in misleading, deceptive, dishonest or fraudulent acts 'in the conduct of professional and business activities'. This has an application wider than just financial planning business. Some other rules, for instance some requiring disclosure (e.g. FPA Ethics and Rules 106-08), require there to be a 'recommendation' made or in prospect, before the rule requires members to make disclosure etc. We discuss what we think a 'recommendation' is, in more detail below. It is only FPA Ethics and Rules 132 under which a principal member may become responsible for the conduct of its representative, which limits the principal member's responsibilities by reference to the 'conduct of the Principal member's financial planning business'. Not even the requirement on a Principal member to effectively supervise its representatives in FPA Ethics and Rules 135 contains this limitation-its terms are far wider.

6.10 Having considered this variation in the extent of the FPA Ethics and Rules we consider there is no justification on their terms, to impose an umbrella definition such as that found in 'financial product' in the Corporations Act, to limit the operation of FPA Ethics and Rules. This conclusion is in line with the approach taken by Finkelstein, J. in *Deakin Financial Services v Financial Industry Complaints Service Ltd* (2006) FCA where the interpretation of the rules of a private financial industry dispute resolving body were at issue. If anything the rules of the Financial Industry Complaints Service (FICS) demonstrate a stronger case for being aligned with the meaning of Corporations Act terms, since FICS was drawn into the Corporations Act regulatory regime by acting as the external dispute resolution body for the applicant under section 912A(2) of the Act. The Federal Court however, gave the FICS rules an ordinary (and wider) meaning than those in the Corporations Act. We think the same approach should be taken with the FPA Ethics and Rules

6.11 Though we have concluded that the FPA Ethics and Rules apply more widely than the definition of 'financial products' in the Corporations Act, it is still necessary to say what we think the relevant boundaries are. For the FPA Ethics and Rules that are germane to this case there are two terms which are defining: first, the term 'recommendation' (FPA Ethics and Rules 106-09) and second what it means to say that the behaviour of an authorized representative 'relates to conduct of the Principal member's financial planning business' (FPA Ethics and Rules 132).

When is a recommendation made?

6.12 The FPA Ethics and Rules speak of an advisor making a 'recommendation' (e.g. in FPA Ethics and Rules 106-109). Many obligations flow from the making of a recommendation, particularly disclosure obligations. These are in issue in this case. However, the FPA Ethics and Rules do not clarify what a recommendation is, and when it is made.

6.13 Applying Justice Finkelstein's approach in *Deakin Financial Services v Financial Industry Complaints Service Ltd* (2006) FCA we give the meaning of 'recommendation' in the FPA Ethics and Rules its ordinary meaning and not the highly technical meaning provided for in S766B of the Corporations Act. The Oxford Dictionary Online defines the verb 'recommend' is to:

'Put forward [advice] with approval as being suitable for a purpose or role. Advise as a course of action'

The derived noun, 'recommendation', would have a corresponding meaning.

6.14 It seems to us that the FPA Ethics and Rules provide for information seeking about the client, product research and analysis and disclosure upon the making of a 'recommendation' in a fashion consonant with this meaning. For example, FPA Ethics and Rules 108 and 109 require information seeking about the client and research. We think this is so that 'the [advice] put forward with approval' is 'suitable for a purpose or role' identified by the client as their financial planning goal. It also occurs to us that financial planning is far wider in its application then mere recommendations made on financial products. For example, it may include advice and recommendations on estate and business planning, margin lending, debt management and reduction and numerous other strategies that fall outside the definition of a financial product recommendation within the Corporations Act.

6.15 Therefore we conclude that a 'recommendation' is made under the FPA Ethics and Rules when a financial adviser puts forward advice with approval as being suitable for the client's financial planning purposes. The question we consider in Section VII below, is whether on the facts Mr. S made such a recommendation to the Fs. In particular, did Mr. S 'put forward' a view about the Hotboats investment, and did he do so in a fashion that promoted the S-Boat as fitting the Fs' purposes of investing for 18 months.

When is the behaviour of an authorized representative such that it 'relates to conduct of the Principal member's financial planning business' (FPA Ethics and Rules 132).

6.16 As we have said, some of the FPA Ethics and Rules depend on there being a 'recommendation' made. The operation of FPA Ethics and Rules 132 by contrast, depends on the conduct of the representative being that 'which relates to conduct of the Principal member's financial planning business.' BFA has made a number of arguments to support its general contention that Mr. S's conduct should not be attributed to them under FPA Ethics and Rules 132. The first which we have rejected above is that the FPA Ethics and Rules like the Corporations Act require the conduct to be in relation to a 'financial product'.

6.17 The next argument is in some ways the requirement for a 'financial product' point again, but from a different standpoint. Instead of a blanket requirement that all the FPA Ethics and Rules are limited by the requirement for a 'financial product' recommendation to have been made, this version turns on whether the Hotboats investment taken up by the Fs was an investment in a registered scheme and hence a financial product (s765A(1)(S) CA). Another possibility is whether the Hotboats investment is a 'managed investment scheme', to which none of the three conditions in S601ED CA applies, and again a 'financial product'. Mr Pritchard (Pritchard submission p7-8) has argued that if neither of these two alternatives make the Hotboats investment a 'financial product' then it is merely a 'part ownership' of a boat and nothing which 'relates to the conduct of the member's financial planning business.' This seems to be another attempt to limit the character and scope of BFAs financial planning business to its Australian Financial Services Licence, which does of course relate only to transactions involving 'financial products'. Instead, the real question for the panel is whether the investment in Hotboats, is one 'which relates to conduct of the Principal member's financial planning business.'

6.18 Evidence was presented by the FPA about the business structure of which Hotboats was part, and which was established and maintained to operate the boat renovation project (FPA Exhibits 6-9, 13). Mr. S gave evidence that there were a number of entities involved in the boat restoration business (Transcript p15). In particular he said:

'There was a number of entities down there." (Transcript p14)

referring to the boatshed where Hotboats carried on business. Mr. S in his early role as an accountant for Hotboats had arranged for some of them to be created.

It is also clear from the evidence that a number of people were approached as investors in Hotboats boat restoration (transcript, p 17-18) and that some like Mr. S and Ms. H, invested quite large sums of money (transcript p 57-62).

6.19 The 'Development Agreement' (FPA Exhibit 5) entered by the Fs is argued by BFA to make the Fs only a 'part owner' of a boat, and not give them a financial investment of the type usually in mind when 'financial planning' is spoken of. But the 'Development Agreement' has been artfully drawn and probably does not make the Fs a 'part owner' in anything. There are for example neither words of conveyance nor was there any delivery that would make the Fs a 'part owner' in the boat as a chattel. The insurance clause is equivocal: it appears that the obligation to insure remains with Hotboats, but the cost is to be deducted from the Fs share before profits are distributed (clause 5). Neither are there any words of loan and repayment that would make the Fs the creditors of Hotboats.

6.20 Instead the Development Agreement seems to evidence an intention that the Fs $65,000 shall be returned to them net of insurance and brokerage (at an unspecified rate) with 8.5% of the net profit, when the boat is repaired and sold. This along with the evidence of setting up a business structure and seeking investors seems to show an intention to pool funds to produce financial benefits.

Here the investors have contributed funds, anticipating a profit where it is not contemplated that they will have day to day control over the use of those funds. In short the Hotboats investment seems to satisfy the criteria in s9 Corporations Act for a 'managed investment scheme' and is likely a security too, as defined in s92 of the Corporations Act.

6.21 Not much is required for a 'scheme' to be established. Mason J in *Australian Softwood Forests Pty Ltd v Attorney-General (NSW); Ex rei Corporate Affairs Commission* [19811 HCA 49; (1980) 148 CLR 121, 129 said "all that the word "scheme" requires is that there should be "some programme, or plan of action". These words were recently cited by Justice Finkelstein in *Financial Services Industry Complaints Service v Deakin Financial Services Pty Ltd* [2006] FCA 1805 where he was considering whether a promissory note issued by the Westpoint Group, also artfully drawn, evidenced an interest in a scheme, and whether it was a financial product. In that case it was found (as an alternative argument) that there was an interest in a managed investment scheme that fell within the definition of 'financial product'. In this case it is likely that the F's interest is one in a 'scheme' and a 'security' and a financial investment of the type associated with 'financial planning business'. But even if it is not, that does not put it outside the operation of FPA Ethics and Rules 132.

6.22 BFA provided the CRC with a copy of its Authorised Representative Agreement with Mr. S dated 11 November 2004. Annexure 1 to that agreement is a copy of the Australian Financial Services License held by BFA at that time. While it is clear that the extent of the express authority given to Mr. S is co-extensive with the AFSL, it is also clear that BFAs 'Business' as defined in Recital A and clause 1.1 of that agreement, as wider than the AFSL. In Recital A BFAs 'Business' is defined as 'Financial Services business which includes, inter alia, the provision of Financial Product Advice and Dealing in Financial Products on the terms and conditions set out in the AFSL ...attached as Annexure 1 of this agreement.'

6.23 The panel considers it likely that BFAs 'financial planning business' included its representatives advising and dealing in a number of products, interests and strategies, as previously mentioned by us, that are outside the definition of 'financial product' or even of 'scheme' or 'security' under the Corporations Act. The terms of the FPA Ethics and Rules and the evidence of BFA and Mr. S's own commercial relationship encompasses more than just financial investments. For example, advising on the financing or re- financing of real property is a common aspect of the 'financial planning' role, since this is the main investment of most individuals seeking planning advice. Indeed, Mr. S himself suggested this when he gave evidence that as part of his business he operated a referral business to a mortgage broker earning fees (transcript p 15,17 & 21). Similarly, part of some financial planning and dealing may well be advising on and arranging margin loans as discussed earlier. Again, these are within the 'financial planning' remit, but do not fall within the definition of 'financial products' under the Act. There was evidence of this in BFA exhibits 17-20 where there was controversy over whether Statements of Advice had dealt with 'leveraged' transactions properly.

6.24 Financial planning is a wide concept. It is the process of developing strategies to assist clients in managing their affairs to meet their needs, objectives and priorities. These may be immediately financial or financial steps to non- financial goals – e.g.: comfortable retirement, paying for education, a trip. The process of financial planning involves reviewing all relevant aspects of a client's situation across a large breadth of financial planning activities. It involves different types of interests and transactions in which wealth may be stored or created. We have by this reasoning come to the conclusion that advising on interests in a 'scheme' or 'part ownership in a boat' which is intended to help a client meet an objective (investing cash for the Fs new house) would come within that 'which relates to conduct of the Principal member's financial planning business.'

6.25 If the representative's conduct is outside express authority as Mr. S's was, in one sense it will not fall within the principal's 'financial planning business.' It will be outside the express terms of the authority arrangements (authorized representative agreement, authorized products list etc.) between the principal and the representative. It is in this sense that BFA challenges the effect of FPA Ethics and Rules 132. It is true that FPA Ethics and Rules 132 does not have such a clear extension of liability to unauthorized acts as is provided by s917B of the Corporations Act, an earlier version of which was discussed by Victorian Supreme Court in *Newman v Financial Wisdom Ltd* [2005] VSCA 110; [2004] VSC 216. Since that decision there has been little room for doubt that under the Corporations Act a principal license holder is vicariously liable for civil remedies in relation to clients suffering loss and damage from their authorized representative's conduct.

6.26 However, FPA Ethics and Rules 132 does make the principal liable for 'conduct by its representatives or employees which *relates* to conduct of the Principal member's financial planning business.' This contemplates a wide range of connection between the principal's business and the representative's conduct. *Relates* arguably includes anything which touches and concerns the principal's financial planning business. It is certainly wider than the possible alternative phrases 'within the Principal member's financial planning business' or 'covered by the Principal member's financial planning business.' The use of 'relates to' allows a wide range of representative conduct, including that which is outside express authority, to be included in FPA Ethics and Rules 132.

6.27 There are other indicators in addition to the words of FPA Ethics and Rules 132 which suggest that it should include representative conduct that is outside express authority. The FPA Ethics and Rules are protective of both the Association's members and the general investing public. If FPA Ethics and Rules 132 were limited to authorized behaviour it would have the counter- intuitive effect that the more outrageous the conduct of the representative, the less likely it would be that the CRC could sanction the principal, and the less effective the regulatory effect of the rule in spurring supervision and monitoring of the representative would be. Therefore on this point we conclude that FPA Ethics and Rules 132 includes vicarious liability for unauthorized conduct by representatives. We also repeat that the meaning of 'conduct by its representatives or employees which *relates* to conduct of the Principal member's financial planning business' is wider than conduct which relates to 'financial products' as defined by the Corporations Act.

Can a Principal Member be vicariously liable for the conduct of an authorized representative in CRC disciplinary proceedings?

6.28 The third reason BFA gives for arguing that the conduct of Mr. S should not be attributed to it is that it is not right that a Principal Member be should be vicariously liable for the conduct of an authorized representative in disciplinary proceedings such as those being brought by the FPA before the CRC. It seems to be an argument in principle that BFAs should not be vicariously liable for conduct which they could not know about, no matter how effective their compliance and supervisory arrangements were.

6.29 It also seems to be an argument that the CRC proceedings and sanctions are disciplinary or penal in quality and that FPA Ethics and Rules 132 offends the general principle in Anglo-Australian law that a principal should not be liable for the criminal acts of its agent. If this submission is really one that asserts the CRC's own proceedings are penal, then we think the submission is misconceived. Although the CRC's proceedings are disciplinary in character, they are not penal and they are certainly not criminal. The FPA Ethics and Rules are a professional code which members adopt voluntarily. They are a regulatory contract on the terms of the FPA's application for membership and professional rules. The FPA Ethics and Rules and the CRC's proceedings are protective of the financial planning industry and of the public. This is in a fashion similar to rules and proceedings of professional groups such as lawyers or actuaries. Though there are differences. The FPA does not enjoy a monopoly on professional accreditation of financial planners. It has no powers of compulsion at all. If a member does not like the FPA Ethics and Rules they may decide not to join or resign. They may seek professional accreditation elsewhere, or do without it. The only compulsory prerequisite to their practicing as a financial planner or advisor is an Australian Financial Services License or authorized representative's authority. So on this point we conclude that the rules and disciplinary proceedings of the FPA being entirely voluntary, are not penal in nature, and do not offend the general principle against imposing criminal liability vicariously.

6.30 There are other legal areas where there is a blurring between the protective or compensatory and the penal. There the courts have found vicarious liability where there is conduct by a representative or agent that is outside authority. So for example in *Ali v Hartley Poynton* [2002] VSC the court found that the defendant brokers were liable for the punitive damages awarded in favour of the plaintiff client, where the broker's representative employee had disregarded terms and abused powers given by a client's mandate. In doing so it adopted a long line of High Court authority allowing vicarious liability for punitive damages. So even if the CRC proceedings were penal, it is not the case that attribution to a Principal Member of the conduct of representatives could not occur.

6.31 Finally on this issue, the Pritchard submissions (p7) argue that the CRC should not make BFA vicariously liable for the conduct of Mr. S where it honestly and reasonably tried to prevent that conduct and took no financial advantage from it. Though in a prior version of the statute, since the decision of the Victorian Supreme Court in *Newman v Financial Wisdom Ltd* [2005] VSCA 110; [2004] VSC 216, there has been little room for doubt that under the Corporations Act a principal license holder is vicariously liable for civil remedies in relation to clients suffering loss and damage from their authorized representative's conduct. This is

whether or not the conduct was authorized by the principal and whether or not the principal knew.

6.32 In that case, like this, the principal received no financial benefit, and did not know of the existence of the authorized representative's clients and the advisory relationship. In that case too, Financial Wisdom asserted that the representative had been acting outside authority, and loss and damage to clients should not be their liability. Section 917A-F of the current Corporations Act is if anything clearer in its intent to make the principal liable for the acts of the representative in similar circumstances. There seems no reason to think that a case like this one would have a different outcome were the Fs to make a claim for loss and damage against BFA (e.g. at FICS). This likely explains the concession on p7 of the Pritchard submissions that 'BFAA may possibly ...have some civil liability to the complainant as a result of the vicarious liability offences.'

6.33 A regulatory purpose similar to that in s917A-F of the Corporations Act and its predecessor is evident in FPA Ethics and Rules 132. That is, making the principal member liable for the conduct of the representative in order to spur supervision and monitoring of the latter. We have already dealt with other questions relative to the operation of the rule: what it means to say that a representative's conduct 'relates to conduct of the Principal member's financial planning business' and whether it operates to impose vicarious liability. Our reasoning there is in line with the beneficial and protective purposes indicated in the words of FPA Ethics and Rules 132 and the context of its operation. It seems to us that it would frustrate those words and protective purposes to limit the operation of FPA Ethics and Rules 132 to circumstances in which the Principal Member knew of the representative's excess of authority. Accordingly we determine that FPA Ethics and Rules 132 applies to impose vicarious liability on the Principal Member, even where the Principal had no actual knowledge of the representative's conduct.

Should the words of both FPA Ethics and Rules 135 and 103 be interpreted to allow a reasonableness standard or objective standard related to industry practice to apply?

6.34 The words of FPA Ethics and Rules 135 require a Principal member to 'maintain an effective system of supervision'. Should that be interpreted to require a Principal member to 'maintain a *reasonably* effective system of supervision'? At p18 of his submissions Mr Pritchard argues along these lines in relation to FPA Ethics and Rules 103. That rule requires that a Principal member 'shall ensure that prospective clients' receive certain disclosures. He argues that FPA Ethics and Rules 135 should read that a Principal member 'shall do all things *reasonably* necessary to ensure' that clients receive the required disclosures.

6.35 The words of FPA Ethics and Rules 135 beg the question as to what an 'effective system of supervision' is to be judged by. In other words what do we mean by 'effective'? Does this amount to a guarantee that no representative will ever be non-compliant? Does it mean that the Principal has to provide a system that is at the same general level as the rest of the industry? Or does it mean that the Principal must supervise in a fashion that is better than most, but not a guarantee of full compliance – in other words at a level that might be called 'best practice'? Unless some benchmark is chosen, FPA Ethics and Rules 135 is really meaningless because we do not know how it is meant to operate.

6.36 In the words of FPA Ethics and Rules 103 it is easier to see the outcome standard - the listed disclosures must be delivered to the client. But what level of effort must the Principal go to in this endeavour? Again, must it maintain such a stellar system that there is never a failure to deliver a required disclosure? Is it only that the Principal's system should be what most Principals provide? Or must it be something more than that, but less than stellar?

6.37 We think that given the current stage of development of compliance practice in Australian financial planning it would be impractical to require an absolutely 'effective' system for FPA Ethics and Rules 135. Similarly for FPA Ethics and Rules 103 we think it is likely to be futile to require a system of disclosure delivery that never ever fails. Instead we think that to discharge these rules it is sufficient that they are complied with to a standard that most practitioners would think satisfactory. In other words the Principal must operate and maintain arrangements that a Principal member in good standing would consider reasonable and neither materially above nor materially below the average standard. For establishing what this reasonable standard is, we rely on the practitioner members on the CRC panel and any evidence that members wish present to the panel. In short we agree with the Pritchard submissions that that a Principal member 'shall do all things *reasonably* necessary to ensure' that clients receive the required disclosures under FPA Ethics and Rules 103. Likewise FPA Ethics and Rules 135 should be interpreted to require a Principal member to 'maintain a *reasonably* effective system of supervision'.

VII. OUTCOME AND REASONS

Did Mr. S make a 'recommendation' to the Fs?

7.1 The evidence provided two alternatives on this question: did Mr. S make a 'recommendation' to the Fs, or did he make a referral to Hotboats, which they then acted on by entering an arms-length commercial agreement to invest?

7.2 Two things are clear from the evidence. First, the Fs clearly thought they were being given financial advice by Mr. S. They had a long history of seeking tax advice from Mr. S, and there was evidence of them seeking incidental advice on financial matters over the years. They did not know, and Mr. S did not attempt to say he had informed them, that there were internal thresholds as to investment duration and amount, that excluded them from being financial planning clients. The level of trust in Mr. S they demonstrated in making no independent inquiries about Hotboats and paying over the investment funds before the signing of the agreement, speaks volumes to support the view the Fs thought they were being given financial advice by Mr. S, and relied on him. They came to him until the last minute, asking for advice about who should be the party to the agreement.

7.3 Second, the evidence makes clear that Mr. S did in fact help the Fs with strategies to assist them to meet their goal – investing money for a new house. Although Mr. S denies some of the statements attributed to him about the F's 18 month investment horizon, he does not deny others (e.g. as they left the boatyard). He does not deny that Mr. B got in touch with him tore-enliven the F's interest in the

investment, because Hotboats had found a vessel that could be restored and sold in less than 18 months. He does not deny that he in tum got in touch with the Fs to advise them that the new vessel was available and was suitable for their purposes and to advise investment in the 'S-Boat' as a course of action' because it suited the 18 month time horizon. Further, he does not deny that he had already given Mr. F general advice that a term deposit or cash management trust would be an appropriate investment, largely because of this 18 month horizon. The evidence supports the conclusion that Mr. S did make a recommendation and one suitable for the particular 18 month goals of the Fs. In the end the Panel was clear that this sequence of events with Mr. S re-contacting the Fs was more than just a mere referral: he actively initiated further contact with an investment recommendation tailored to elicit approval from his clients.

7.4 Mr. S argued that the Fs were tax clients of his but never financial planning clients. That he merely gave them a helpful tip in introducing Hotboats. In his view it was on their own initiative and independent of advice from him that they entered the investment agreement with Hotboats. But the evidence shows clearly that the Fs had made no other substantial investments, and that when they did have cash to invest, they came straight to Mr. S from whom they had sought advice on financial matters in the past. With this background, it is at least improbable that they would have ventured independently into an investment without advice. **It** was the 'mere referral' interpretation of events that Mr. S used to justify his failure to observe disclosure and other requirements of the FPA Ethics and Rules required on making a 'recommendation'. However Mr. S brought little evidence, beyond his own assertions, to demonstrate that the Fs were not financial planning clients but were referred to Hotboats. Indeed, the main evidence about the overlap of Mr. S's accounting, tax and financial planning clients and how these were managed, was brought by BFAs. As noted by the external auditor (BFA exhibit 19) the evidence suggests that Mr. S did not manage this overlap well, and that often the separations which should have been observed between them were overlooked.

7.5 We think the evidence is in favour of finding that Mr. S understood the Fs had money to invest and wanted advice on how to invest it in addition to considering the F's personal18 month investment horizon. Mr. S also actively followed up the Fs with the investment proposal even after they had turned it down the first time. Flowing from this and our conclusion on the meaning of 'recommendation' in the FPA Rules, we consider the Fs did receive a 'recommendation' to invest in Hotboats from Mr. S. Even if we had been unable decide between the parties on the evidence and legal arguments, we still think that the protective and beneficial purposes of the FPA Ethics and Rules would have compelled us to prefer the Fs complaint over Mr. S's mere referral explanation. Fortunately that is not the case, and we are able to conclude on the clear balance of evidence and for legal reasons that the Fs did receive a 'recommendation' to invest under the FPA Ethics and Rules.

Did Mr. S Fail to Disclose 'Remuneration…[or} any other benefit reasonably capable of influencing the making of the recommendation'

7.6 Since we have found that Mr. S did make a recommendation to the Fs, the next question we must consider is whether he or any of his associates, received any benefit that required him to disclose the benefit to the Fs. The FPA Ethics and Rules potentially breached here are 103, 106(a) or 107 and Ethic 1. For an adverse finding in relation to Ethic 1 the CRC must find dishonest conduct or conduct which lacks integrity. We think conduct which lacks integrity need not have an element of fraudulent dishonesty, nor be unlawful (eg breach of equitable duty) but may involve a departure from acceptable commercial morality. We think integrity means high standards of straightforwardness, honesty, candour and sincerity in the provision of financial services.

7.7 The disclosures collectively required by FPA Ethics and Rules 103, 106 (a), (b) and (c), and their oral equivalent under FPA Ethics and Rules 107 are wide. They range from disclosure of the proposed method of remuneration, through disclosure of fees to any other benefit, pecuniary or non-pecuniary, reasonably capable of influencing the making of the recommendation. The disclosures must be made whether the benefits are direct or indirect, received or receivable and whether received by the member or a third party in connection with the recommendation.

7.8 Nothing in the evidence before the panel allows us to conclude that Mr. S was in fact paid anything by Hotboats in relation to the investment made by the Fs. However a conclusion on whether Mr. S received or expected to receive 'any other benefit capable of influencing the making of the recommendation' to the Fs is more difficult. Initially Mr. S gave evidence that he had a brief appointment as an accountant in late 2005 and early 2006, ending about the time the Hotboats Unit Trust and MG Trusts were signed up. He said that the unexpected imposition of fundraising conditions about that time caused him to withdraw. Though he also said that:

'In fact, I didn't really not agree to do it. I just said [presumably to himself], this is sort of a farce. I'm not going to be too concerned about it.' (Transcript p42).

7.9 There is also inconsistency about the timing and origin of the financial conditions. When documents which showed that that he did know of the fund raising condition earlier than February 2006 were pointed out to him, Mr. S acknowledged he attended two or three meetings at Mr. Z's house in late 2005 when these things were discussed. In particular (transcript p 51-54) he had difficulty in providing a coherent explanation for an interpretation of the email of 15 November 2005 that was other than that he and Mr. B had proposed the Hotboats participation structure to Mr.z. It was this structure that was eventually implemented in large part through the establishment of the trusts which he directed.

7.10 While Mr. S may have had reservations about the association with Hotboats, it seems these were not communicated to anyone else, including the Fs. Mr. S could not explain why in April2006 he was still being written to by Mr. B about matters to do with the trust deeds, when he had given evidence that as far as he was concerned these had not been persisted with from February 2006 onwards

(transcript p 66). He did not try to hide that he had introduced someone to work in the boat-yard (transcript p 64). Further as discussed in section IV in September 2006 well after the Fs had invested, Mr. S was still meeting with Mr. B to discuss the raising of finance for Hotboats using a boat as security for a loan from Macquarie Finance (Leasing). The FPA argues that the cumulative effect of this evidence shows that Mr. S had a business role at Hotboats that he was to be remunerated for by holding units in the Hotboats unit trust through trusts associated with or controlled by him.

7.11 The panel also observes that it is only in recently settled legal proceedings brought by Mr. S and Ms. H that the Hotboats units Mr. S controlled have been redeemed or cancelled. Those units were controlled by Mr. S when the Fs entered the 'Development Agreement'. The Development Agreement provides that 50% of the profits of the sale of any boat were to be retained by Hotboats. It was this amount that Mr. S and Mr. B were to share through the MG Trust. Further the Development Agreement also provides for a commission (at an unspecified rate) to be retained by Hotboats, and it is an open question as to whether Mr. S would have benefited from a share of this as well. So even if Mr. S did have reservations about the Hotboats scheme in February 2006, he did not share these with anyone else. We have no doubt that if the 'S-Boat' had been sold within the 18 month time-frame, Mr. S would have shared in the profits and possibly from the commission as well.

7.12 If all this were not enough, for no other reason than the completion of work on other vessels so his could be worked on, Mr. S was interested and involved in the day to day financial and management activities of Hotboats (transcript p64). Since expediting work on Mr. S's own boat had clear financial benefits for him, we think this alone is a material personal interest. Mr. S did disclose to the Fs that he had an interest in one of the Hotboats vessels. However, we do not think that was sufficiently detailed and comprehensive disclosure for the Fs to understand the nature and effect of the advantages for Mr. S and the conflicts which might effect Mr. S's recommendation.

7.13 In these circumstances the panel has concluded that Mr. S was required under the FPA Ethics and Rules to inform the Fs of his commercial arrangements under the Hotboats Unit Trust and the associated MG Trust. The potential for those arrangements to have been a 'benefit reasonably capable of influencing the making of a recommendation' (FPA Ethics and Rules 106(b) or 107 (b)) seem to us to be too obvious to need further elaboration. They also had the potential to be 'remuneration …or any other pecuniary …benefit' (FPA Ethics and Rules 106 (a) or 107(a)) and those rules still require disclosure whether the benefits are 'direct or indirect, received or receivable by the member.' And finally Mr. S still had an obligation to disclose if the benefits were to be received by one of the third party entities that were in his control (FPA Ethics and Rules 106(c) or 107(c)). In relation to Ethic 1 we conclude that there is no evidence that Mr. S was dishonest. However we do think that failing to make the disclosures required by the rules also amounted to a breach of fiduciary duty owed by Mr. S to the Fs. This is unlawful conduct, and it was also a departure from sound commercial morality. For these reasons we consider that Mr. S acted with a lack of integrity and was in breach of that aspect of Ethic 1.

7.14 The fact that nothing was in fact paid is irrelevant to the FPA Ethics and Rules. The fact that the trusts were 'not set up' as Mr. S asserted seems to us to be inconsequential. Even if the trusts were not formalised in every detail, they had been executed and there is ample evidence that from early 2006 that they were intended for sharing profits. And, as we have pointed out, there is also evidence that the business arrangements they were intended to accommodate were continued at least into late 2006 with Mr. S involved. For these reasons we determine that Mr. S failed to make disclosures required of him under the FPA Ethics and Rules.

Did Mr. S Fail to Make Other Disclosures Required by the FPA Ethics and Rules?

7.15 The FPA's allegation that Mr. S failed to make the other disclosures required by the FPA Ethics and Rules has not been contested. Instead it was argued that because Mr. S did not make a recommendation to the Fs and had no commercial or other interest in the Hotboats venture, he had no obligation to make those disclosures.

7.16 We have concluded on the evidence and the law that Mr. S did make a recommendation to the Fs and did have a commercial or other interest in the Hotboats venture which was not disclosed. **I**t follows that Mr. S breached the FPA Ethics and Rules as alleged in the FPA's Breach Notice.

BFAs

A. Should the Conduct of Mr. S be Attributed to BFA Under FPA Ethics and Rules 132?

7.17 We have already concluded in section VI that as a legal matter the conduct of Mr. S should be attributed to BFA. The question we must consider here is the extent of that liability. Unlike civil or even punitive damages circumstances where the principal is simply liable in the stead of the agent, the point of vicarious responsibility here is to underline the protective effect of the FPA Ethics and Rules to the benefit of the investing public and the financial planning industry.

7.18 BFA knew nothing of the existence of the Fs and received no commission. We think in these circumstances our discretion to impose sanctions should be used lightly. Further, the member responsible for the conduct is before the CRC and can be sanctioned in his own right for the conduct, which should have the required protective effect for the industry and the investing public. Accordingly, on this issue although we find that BFA is liable for the conduct of Mr. S under FPA Ethics and Rules 132, we consider it appropriate in relation to this particular rule to sanction them with an admonition.

B. Did BFAs Supervise Mr. S Effectively Under FPA Ethics and Rules 135? Did They Ensure he Made Required Disclosures under FPA Ethics and Rules 103?

7.19 In section VI we have already set out our view that both these rules should be interpreted as requiring a reasonable or objective standard of performance, not an absolute standard of performance. The question here is therefore, whether in the supervision of Mr. S who ran several financial and investment related businesses from the one premises, BFA discharged its obligations in relation to the supervision of Mr. S to a reasonable standard for a Principal member in good

standing.

7.20 It was clear from the evidence of Mr. F that although he knew Mr. S was a financial planner he did not know that Mr. S's Principal member was BFA (Transcript p23) and that he only discovered this when he complained to the FPA. We have reviewed the evidence from the 2003-2005 external audit reports and the minutes of meetings that BFA furnished us which minuted follow-up action with Mr. S on these reports. Although all three of the external auditors mentioned the absence of BFAs name on Mr. S's business signs, there is no mention of this in any of the follow-up action. The sign appears to have remained unchanged for the three years in question. Similarly, despite the evidence of prolonged emailing to get the financial planning letterhead and business card right in early 2004, by the time of the 2005 review, Mr. S was still using a business card without BFAs name. The panel is not surprised that the Fs did not know about BFAs relationship with Mr. S.

7.21 It is also clear from Mr. F's evidence that in meetings with Mr. S, no delineation was made of tax or accounting advice and financial planning advice. No Financial Services Guide was given, nor did Mr. S attempt to persuade us that any of the preliminary disclosures required by the FPA Ethics and Rules had been given. At no time then, did Mr. F have the opportunity to know whether he was or was not being given financial advice, and be accorded the disclosure protections which FPA Ethics and Rules are designed to give to members of the investing public.

7.22 It is not disputed that Mr. S operated a colour-coded customer file system to distinguish financial planning from accounting files. Documents for financial planning matters were kept in purple files. BFAs external auditors knew of this system in 2003 (BFA exhibit 17). There is a suggestion (see Pritchard submissions p10) that the purple files were used to keep and identify the financial planning documents of those clients who were *both* accounting and financial planning clients. But the 2003 external auditor's report at BFA Exhibit 17 states 'The advisor colour codes all financial planning files purple'. As there is no other evidence to support the greater level of identifying 'two-track clients' suggested by Mr Pritchard, we assume that all financial planning files were purple, regardless of whether the client was also an accounting client. In any case it seems likely that by 2005 this system had fallen down- as we have already mentioned the 2005 external audit found that the client details of accounting and financial planning clients were being kept together.

7.23 The evidence on referrals and Mr. S's businesses we reviewed in section V leads us to two conclusions. The first is that whether remunerated or not, referrals were an important part of Mr. S's businesses. The second is that almost nothing in the evidence that BFA supplied about its supervision system addressed the inter-relation of these with Mr. S's financial planning business. The issue was raised in the external audits, but no one picked up the contrary answers that were given about this issue in the audits and in the BFA Adviser Compliance Questionnaire, completed by Mr. S in November 2003. The CRC accepts that Mr. S may have received some training about how to recognise when financial services business was being done (as opposed to accounting business). However the supervision system seems to have lacked clear protocols and focused supervision about how a representative should manage the overlaps between related businesses. Instead

BFAs evidence was really about what BFA saw as the practical limitations of supervising a planner who operated several businesses from the same premises. Ms Mote gave evidence that:

'We didn't have a different system in place for accountants who were also financial planners. We looked at their financial planning business, not their accounting business.' (Additional Transcript p7).

7.24 Led by the views of the practitioner members, the CRC is of the opinion that in supervising accountants who were also financial planners, that BFAs failed to maintain a reasonably effective system of supervision of Mr. S. This is largely because it failed to develop itself, or with its external auditors, a system of supervision which addresses the particular context of representatives who operate more than just a financial planning business from the same premises. They had a compliance system for financial planning businesses, but it did not address the supervision of businesses that were more than that. For example there seems to have been no attempt to deal with the inadequate signage at Mr. S's business premises. There was no effort to re-check Mr. S's letterhead and business cards for Licensee information. No-one attempted to get a picture of what was really happening with Mr. S's referral arrangements. No -one adequately followed up inadequacies in the advice model used by Mr. S. These are all matters of primary importance in the supervision of a multi-business representation and were relevant to the issues that arose in the provision of advice to the Fs.

7.25 It is also clear to the CRC in reviewing the external audit reports and the subsequent correspondence and minutes of compliance committee meetings that the follow-up discussions with Mr. S concentrated on revising the auditor's reports, rather than addressing recurring deficiencies in Mr. S's business arrangements and client files. Every year the auditors expressed concerns about his understanding of conflicts disclosures and product research – also his attendance to formal sign-offs etc. It surprises the CRC that a financial planner of nearly a decade standing, should get a higher demerit score in 2005 than previous years. The transition to FSR was well over by 2005. It is not really until BFAs own vetting of Mr. S's statements of advice dated 21 August 2006 (BFA exhibits under letter of30 July 2008) that there is any sharpness in the attention given to the recurrent sloppiness of Mr. S's keeping of financial planning files, that had been evident in successive external audit reports. The CRC notes that the representative agreement ended about two months later.

7.26 In conclusion the CRC finds that BFA failed properly to understand the significance of the external audit reports it was receiving. Consequently it failed to take appropriate action to insist that Mr. S remedy his systems, especially in relation to disclosure of his relationship with BFA and his conduct of financial planning businesses alongside others. We think that BFA failed to maintain an effective system of supervision of Mr. S even at the reasonableness standard. There were many warning signs prior to Mr. S's recommending Hotboats to the Fs and BFA missed them.

VIII. FINAL STATEMENT OF DETERMINATION

For these reasons the CRC finds:

A. In Relation to Mr. S

A breach of FPA Ethics and Rules:

Rule 103 (a)-(e)

Rules 106 (a) to (d) and 107

Rules 110,111,112 and 113

Ethic 1, except that the CRC does not find that Mr. S was dishonest in his conduct in relation to the rule.

B. In Relation to BFA

A breach of FPA Ethics and Rules:

Rule 132

Rule 135 and

Rule 103 (a)-(e).

IX. SANCTIONS

9.1 Since the CRC has found breaches of the FPA Ethics and Rules it is authorized to impose sanctions. Those sanctions are available by force of paragraph 3.5.1 of the FPA Constitution and paragraphs 1.2 (definition of sanctions), 9.9 and Schedule B of the Disciplinary Regulations adopted by the FPA Board on 17 July 2007.

9.2 On 15 October 2008 when it delivered its reasons the CRC invited submissions in writing from the FPA and the members on sanctions that it was minded to impose. It considered those submissions and now makes the determination in relation to sanctions set out below.

A. In Relation to Mr. S

9.3 The CRC reprimands Mr. S for his failure to make the disclosures required by the FPA Ethics and Rules. It considers Mr. S's conduct to be a very serious departure from required professional standards of conduct. This is especially so in relation Mr. S's failure to disclose the benefits which were planned to flow from his commercial relationship with Hotboats and his lack of regard for both the Fs financial position and the reliance they placed on him to give them appropriate advice on how to invest their money. The CRC considers there has been a gross disregard of the rules and a lapse in integrity. A strong reprimand is therefore warranted and made.

9.4 The CRC directs that Mr. S shall have his designation as an FPA Certified Financial Planner (CFP) removed for a period of 12 months from the date of the making of the final determination and sanctions in this complaint. Mr. S may

reapply for the CFP designation at the end of 12 months.

9.5 Mr. S is to outline within 3 months of the making of the final CRC determination and sanctions the steps that he will put in place for improved operation of his financial planning business with the other financially related businesses he conducts and his professional conduct. The FPA Legal & Compliance Officer to review Mr. S's proposals and agree changes if required. The FPA Legal & Compliance Officer to review the operation of the agreed improvements one year after its implementation and Mr. S's record of continuing professional development over that time, and report back to the CRC.

9.6 The FPA's Investigations Officer to send a copy of this determination to Mr. S's current licensee, Financial Wisdom, with a request for their assistance in the implementation of the order in paragraph 9.5 above.

9.7 The CRC fines Mr. S $5,000 to be paid within 30 days of the making of final determination and sanctions in this complaint.

9.8 The CRC orders Mr. S to pay the FPA's costs of the hearing being $5932.55 to be paid within 30 days of the making of final determination and sanctions in this complaint.

B. In Relation to BFA

9.8 The CRC determines that as a result of the operation of FPA Ethics and Rules 132 BFA is vicariously liable for the conduct of Mr. S. They note however, that BFA had no actual knowledge of Mr. S's conduct and took no material benefit from it.

9.9 The CRC reprimands BFA for its breach of both FPA Ethics and Rules 103 and 135. **It** fines BFA $5000 for these breaches to be paid within 30 days of the making of final determination and sanctions in this complaint.