

FINANCIAL PLANNING ASSOCIATION

**CONDUCT REVIEW COMMISSION
APPEAL PANEL**

**DETERMINATION OF APPEAL
AND REASONS FOR DECISION**

Emmanual Cassimatis

PANEL MEMBERS: *Professor Dimity Kingsford Smith (Chair)*
Mr Bruce Christie
Mr Ian Heraud

DATE OF HEARING: 4 February, 2011

DATE OF FINAL DETERMINATION: 26 July 2011

PARTIES' REPRESENTATIVES: *Mr Ivan Middleton (FPA)*
Greenfields Solicitors (Cassimatis)

DETERMINATION OF APPEAL AND REASONS FOR DECISION

I. SUMMARY OF APPEAL DETERMINATION AND REASONS

II. THE APPEAL

This is an appeal by Emmanuel Cassimatis (Cassimatis) against the decision of the Financial Planning Association (FPA) in its disciplinary capacity under its Constitution and Disciplinary Regulations. The complaint was originally 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 Cassimatis a member of the FPA. The complainants Mr D and Mrs V W (the W) complained that they received defective financial advice from Cassimatis. Cassimatis was at the time a director and authorized representative of Storm Financial Pty Ltd (Storm Financial) a principal member of the FPA. Storm Financial was the holder of an Australian Financial Services License and is now in liquidation.

2.2 After investigation and correspondence between the FPA and Cassimatis it was alleged that Cassimatis had a case to answer under the FPA's Code of Ethics and Rules of Conduct (FPA Ethics and Rules). The case to answer alleged breaches of the Ethics and Rules as follows:

- (a) **Charge 1** - breached Rule 101 of the FPA Rules of Professional Conduct in that in the conduct of professional and business activities, the member engaged in an act or omission of a misleading, deceptive, dishonest or fraudulent nature.
- (b) **Charge 2** - breached Rule 110 of the FPA Rules of Professional Conduct in that in April 2008 in preparing written or oral recommendations to the W the member did not develop a suitable financial strategy or plan based on the relevant information collected and analysed.
- (c) **Charge 3** - breached Rule 110 of the FPA Rules of Professional Conduct in that the member sent a letter dated 8 October 2008 to a number of Storm clients, including the W and in preparing the written recommendations contained in that letter did not develop a suitable financial strategy or plan for those clients, based on the relevant information collected and analysed.
- (d) **Charge 4** - withdrawn
- (e) **Charge 5** - breached clause 3.3(f) of the FPA Constitution in that the member failed to supply material or further information or assist the Chief Executive Officer of the FPA, or other person, with respect to an FPA Compliance Review or investigation, whether of the member or otherwise.

- (f) **Charge 6** - breached Rule 127 of the FPA Rules of Professional Conduct in that the member failed to co-operate with the FPA in all aspects of an investigation or compliance review, as authorised pursuant to the Constitution and Regulations of the FPA.
- (g) **Charge 7** - breached Ethics Principle No. 6 of the FPA Code of Ethics, namely Professionalism, in that the member's conduct, in breaching the other Rules of Professional Conduct, has led to discredit to the financial planning profession.

2.3 Hearings of the matter were held on 22 March and 27 April 2010. A transcript of evidence and arguments was created for both hearing days. The CRC panel which made the original determinations, provided written reasons for its final determination on 20 October 2010. In those written reasons the CRC Disciplinary Panel made the following determinations:

- (a) **Charge 1** – the FPA had made out its case on the balance of probabilities and the allegations of breach of Rule 101 were proved;
- (b) **Charge 2**– the FPA had made out its case on the balance of probabilities and the allegations of breach of Rule 110 were proved;
- (c) **Charge 3** - the FPA had made out its case on the balance of probabilities and the allegations of breach of Rule 110 were proved;
- (d) **Charge 4** – charge withdrawn.
- (e) **Charge 5** – the FPA had not made out its case and the allegations of breach of clause 3.3(f) of the FPA Constitution were not proved;
- (f) **Charge 6** - the FPA had not made out its case and the allegations of breach of Rule 127 of the FPA Rules of Professional Conduct were not proved;
- (g) **Charge 7** - the FPA had made out its case on the balance of probabilities and the allegations of breach of Ethics Principle No. 6 of the FPA Code of Ethics, namely Professionalism, were proved.

2.4 This appeal is from those determinations and reasons. Cassimatis' grounds of appeal are set out in a letter from his solicitors, dated 19 November 2010. The appeal is made under the FPA's Disciplinary Regulations in particular clause 10 and especially paragraph 10.2 which sets out the permissible grounds of appeal. Those grounds of appeal are:

- (a)
 - (i) a material breach of the Disciplinary Procedures occurred which was prejudicial to the Member's defence;
 - (ii) the conduct does not constitute a Breach;
 - (iii) against the Sanction imposed;

(iv) a material fact was not available to the Member until after the assessment by the Conduct Review Commission Disciplinary Panel.

No new material was presented to the Appeals Panel. The appeal was conducted on 4 February 2011 on the written submissions of the parties, being Cassimatis' letter of 19 November 2010, and the FPA's response received by the Panel on 28 January 2011. No transcript was made of the proceedings on 4 February 2001 because there was no new oral evidence or argument.

2.5 The Appeals Panel in making its determination and furnishing its reasons, followed the format and numbering of the original Breach Notice and the Disciplinary Panel in its determination. It has dealt with Cassimatis' grounds of appeal in relation to each of the charges or breaches set out in the Breach Notice. It has applied the arguments made by Cassimatis in his grounds of appeal to each of the charges, and made a determination in accordance with the Disciplinary Regulations clause 10.

2.6 *Forbes on Tribunals* makes the observation that 'appeals within associations are commonly conducted as rehearings de novo' (p252). This would mean that the Appeal Panel would have to allow the member to conduct the entire case again – and could disregard the findings made by the Disciplinary Panel as to fact, law or sanctions. Although the FPA review or appeal process is generous, it is not a rehearing de novo.

The generosity is mostly in the relatively wide second ground for review in cl 10.2(a)(ii) of the Disciplinary Regulations. That the Disciplinary Regulations allow a member to contend that 'the conduct does not constitute a breach or offence' could open up quite a lot of what has already been canvassed in the Disciplinary Panel determination. Otherwise the grounds for review are not overly wide, and allow for fairly focused complaints by the member of the conclusions arrived at in the Disciplinary Panel determination. The fact that the Disciplinary Regulations set out 'grounds for review' and in cl 10.8 permits the Appeals Panel to find only whether the breaches have been proved or not, strongly suggests that the appeal process is more limited than a rehearing de novo.

It should also be kept in mind that the member has already had a generous opportunity to make submissions on the next to last version of the Disciplinary Panel's determination. There is therefore warrant in both the Disciplinary Regulations and the CRC's process for keeping the appeal as focused as the Disciplinary Regulations allow.

III. APPEAL DETERMINATIONS AND REASONS IN RELATION TO EACH OF THE CHARGES

3.0 OVER-ARCHING LEGAL QUESTIONS

3.1 Cassimatis has raised a number of legal questions as foundational to his appeal. He asserts that these questions demonstrate that the Disciplinary Panel made numerous breaches of the disciplinary procedures. For these to be operative breaches, the disciplinary procedures require them to be material and prejudicial to the member's defence, and Cassimatis asserts they are. In particular Cassimatis asserts that the following breaches of the disciplinary procedures occurred:

- The Panel failed to apply the prescribed standard of proof;
- The Panel placed the onus of proof on the member rather than on the complainant;
- The Panel failed to give proper reasons;
- The Panel has concluded that a breach has occurred on a basis not contained in the Breach Notice and has failed to accord Cassimatis natural justice;
- The conduct does not constitute a breach.

3.2 These assertions can only be analysed and a determination arrived at, within the context of each of the breaches alleged. Accordingly, this appeal determination will proceed by giving a short overview of the legal position in relation to each of these grounds of appeal. It will then apply the legal conclusions so arrived at to each of the breaches. It will do so in the context of analyzing the facts found and reasoning of the Disciplinary Panel in relation to each breach which has been appealed.

3.3 Cassimatis also asserts in making this appeal that there are some jurisdictional matters on which the Disciplinary Panel erred. Again, these are over-arching questions, and he asserts they affect the entire legal force and effect of these proceedings. The first objection argues that Cassimatis was not a member of the FPA. A variation of this argument, but equally fatal if correct, accepts that Cassimatis was an FPA member, but not one of the character which allows this tribunal to impose sanctions on him.

The second jurisdictional matter Cassimatis raises, goes to whether warnings allegedly provided by Cassimatis to the W, had the effect of transforming a personal advisory context, into a general advisory context. The importance of this is of course that the latter type of advisory situation is attended by many fewer obligations on advisors, and consequently less potential for disciplinary proceedings. And even if the distinction between the personal and general

advisory contexts which operates in the Corporations Act, is not relevant to the FPA rules and ethics, Cassimatis still makes an unspecified argument that warnings he says he gave meant he was not advising the W, but simply giving them information, or going through preparatory 'what if' scenarios with them.

The third jurisdictional question is that there was no true 'complaint' made by the public and according to the rules, to trigger the FPA's disciplinary process.

3.4 Turning first to Cassimatis' assertions that the Disciplinary Panel made numerous breaches of the disciplinary procedures, we consider the legal issues which the appeal points raise, including jurisdictional questions, below.

3.5 *The Panel failed to apply the prescribed standard of proof;*

Disciplinary Regulation 9.5 requires the Disciplinary Panel to make its determinations 'on the basis of material before it on the balance of probabilities.' Further, Disciplinary Regulation 9.6 provides that the Panel need not be bound by the rules of evidence 'but inform itself on any matter as it sees fit.'

The judicial decisions on the operation of the 'balance of probabilities' test in domestic tribunals such as the CRC, make it clear that there is a sliding scale of 'reasonable satisfaction' or 'balance of probabilities'. In other words, the degree to which the tribunal has to be satisfied on the evidence or the weight in the balance of probabilities is determined by the degree of prejudice to the individual being disciplined. The more serious the consequences for the member, the more satisfied the Panel must be of the correctness of the evidence. Similarly, as the allegations become less probable the tribunal must be more and more comfortably satisfied of their truth. These principles have long been part of Australian law and were established in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-2.

Clearly domestic disciplinary tribunals are not governed by the criminal standard of proof (beyond reasonable doubt) but in very serious professional disciplinary cases, the degree of satisfaction that the tribunal must have in the safety and security of the evidence, may approach the criminal standard. So for example, a proposal to de-register a medical practitioner for 'infamous conduct' demands a higher level of satisfaction than application to fine a footballer for foul play. One important indicia of the seriousness of a Panel determination is whether expulsion or de-registration, will prevent the professional earning their livelihood as such and losing their reputation as an honorable and competent professional. If so, then the prescribed standard of proof will require a higher degree of satisfaction in the evidence.

However, it is also clear as Forbes points out, that the *Briginshaw* test can be satisfied by the evidence of one witness, even if the evidence is disputed *Dental Board of Queensland v B* [2004] 1 Qd R 254 at 267. Further, in tribunals with rules like the CRC the courts give a much wider scope as to what may be considered evidence. That expands the scope of evidence which may be taken into account in satisfying a *Briginshaw* standard of proof.

3.6 The Panel placed the onus of proof on the member rather than on the complainant;

The idea of onus (or burden) of proof developed from common law evidentiary principles to provide answers to practical problems in litigation between parties in a court of law. The concept is concerned with matters such as the order of presentation of evidence and the finding a court should make when it is left in a state of uncertainty by the evidence on a particular issue.

3.7 The translation of the legal rules governing onus and the law of evidence into contexts outside courts, is not easy, especially when as with the CRC the constituting rules of a tribunal mean it is not bound by the strict rules of evidence. This has been made very clear in cases to do with the Australian Administrative Appeals Tribunal, which by its statute “is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate” (AAT Act s 33(1)(c)). The text of Regulation 9.6(c) of the FPA’s Disciplinary Regulations repeats this provision, almost verbatim. The AAT cases stand for the proposition that there is no onus placed on either party before the AAT, or administrative tribunals in general. This is best described as a presumption; generally there will be no onus, but this can be rebutted either expressly, or via necessary implication to be found in the relevant acts¹, or in the case of the CRC the Disciplinary Regulations.

3.8 In the case of the CRC, Regulation 9.2 sets out a procedure for the presentation of evidence, providing for the FPA to present its case, and allowing the member to respond. If matters were left here, it might be argued that the FPA bears the onus of proving the case on the balance of probabilities, and it is then up to the member to reverse those probabilities with their evidence. The FPA Disciplinary Regulations go on however, to permit the panel itself to question all relevant persons who might give evidence (Reg 9.2), and further, the panel can take written submissions, which could include those containing evidence. This along with the fact that the CRC is not bound by the rules of evidence and may inform itself of matters it sees fit, gives the context an inquisitorial cast, into which the idea of onus of proof does not sit easily. It would therefore be possible for the CRC to find itself satisfied about the *standard* of proof from evidential sources other than those brought to the panel by the FPA, or indeed, on evidence not elicited for the panel by either party. So while the Disciplinary Regulations probably require the FPA to show a prima facie or preliminary case against the member, it is not at all clear that the Regulations go on to require the FPA to bear the onus of proof thereafter. Onus will be a practical question of greater or lesser relevance, depending on how actively the panel asks questions, and the other sources of evidence by which it seeks to inform itself.

3.9 The Panel has failed to provide proper reasons for all its decisions

¹ See for instance see *Dickinson v Minister for Pensions* [1953] 1 QB 228

There is no common law obligation for a tribunal to provide reasons for decisions; however the CRC, by virtue of Disciplinary Regulations 9.10, is bound to do so under contract. If reasons are provided a court may examine them for legal errors.² In the present circumstances legal errors may arise if the Panel is found not to be acting within the terms of its own regulations. Beyond this the court has a general jurisdiction to review the decision based on general grounds of fairness.

3.10 There are two accepted bases of review, where reasons are required and may be found insufficient. The first is where (as with the CRC) reasons are required under contract: ground 6.7 of the Notice of Appeal is in effect saying that the Panel was in breach of its contractual obligations because it did not make essential fact findings upon which the findings of misconduct and breach under rule 101 were based.³ That is the tribunal was bound to make a finding that misrepresentation had occurred before it came to a conclusion that rule 101 had been breached. In order to breach this obligation to give reasons the Panel would have to either neglect to make the fact finding entirely, or otherwise arrive at the finding of breach of rule 101 in a way that was totally unjust (see below).

3.11 The second basis for a review in relation to quality of reasons is on the general jurisdiction to review based on fairness: this general jurisdiction exists independent of contract:

‘It has further been held that, in certain circumstances, the court has power to intervene, irrespective of the terms of any contract that may be applicable’.⁴

This general power seems to allow the court to review a decision if they believe doing so is necessary in the ‘attainment of justice.’⁵ The court will form this opinion if it can be demonstrated that the decisions were not made honestly or in good faith.⁶ In the same case *Australian Football League v Carlton Football Club Ltd*, Hayne JA went on to give a more specific list of grounds under which a decision may be subject to review for fairness –

‘decisions of domestic tribunals that are ‘absurd’ or ‘unreasonable’ (Dickason v Edwards (1910) 10 CLR 243 at 254 per O’Connor J) or are decisions that ‘no reasonable man could come to’ (Dickason at 254 per O’Connor J) or are decisions contrary to ‘fundamental principles of common justice’ (Dickason at 255 per O’Connor J) or are decisions ‘at which no reasonable man could honestly arrive’ (Dickason at 258 per Isaacs J) or are decisions for which there is ‘no evidence’ (Lee v Showmen’s Guild of Great Britain [1952] 2 QB 329 at 340 per Somervell LJ) or are decisions affected by ‘Wednesbury unreasonableness’ (Associated Provincial Picture Houses Ltd v Wednesbury

² *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997

³ Ipp AJA *Mitchell v Royal New South Wales Canine Council Ltd* (2001) 52 NSWLR 242 at 41

⁴ Above n.1 at 37

⁵ Tadgell JA in *Australian Football League v Carlton Football Club Ltd* at 550

⁶ Above note 5 at 552

Corporation [1948] 1 KB 223). (I need not and do not choose between these various expressions).⁷

In alleging that the Panel failed to provide reasons for decisions Cassimatis is in effect alleging either:

1. The tribunal's reasoning did not include the necessary fact conclusion which it was required under the Disciplinary Regulations before it found the member guilty of breach; or
2. It arrived at this decision in an absurd, unreasonable, or otherwise unjust way.

Both of these grounds require a high degree of legal impropriety on the part of the Panel in relation to a particular finding.

3.12 Further as a unanimous NSW Court of Appeal put it in *Adler v ASIC NSWCA*

'A judge's reasons must be read as a whole, in a common sense way, the obvious need not be expressly stated.'⁸

We think that these words apply just as strongly to the reasons of a domestic professional disciplinary tribunal such as the CRC.

3.13 *The Panel has concluded that a breach has occurred on a basis not contained in the Breach Notice and has failed to accord Cassimatis natural justice;*

This is an assertion that the FPA has failed to give Cassimatis notice of breaches which have then been the subject of disciplinary proceedings against him. It is a simple statement that the 'hearing rule' of natural justice has been infringed because the member has not had the chance to defend himself against breaches that have been alleged against him. It is an objection that the breach notice issued to Cassimatis did not include the grounds and details of breaches of the conflicts of interest rules, required by the rules to ground a finding that they had been breached. The hearing rule of natural justice has a fluid content, but it does require that a person is given sufficient information about the grounds and details of any allegation made against them, to give them a chance to answer the charge. As Forbes points out (at p82) 'a rule that exempts a tribunal from the rules of evidence does not exempt it from this rule.'

3.14 *The conduct does not constitute a breach.*

⁷ Hayne note 5 at 568

⁸ 2003 NSWCA at para 570.

This is a ground of appeal that can only be determined in the factual matrix of each breach. We examine the facts of each breach as found by the Panel, and analyse each according to the legal principles we have set out in this part, below.

3.15 *Was Cassimatis a member of the FPA or the right type of member to be made subject to CRC proceedings and sanctions;*

The FPA is a company limited by guarantee. In his application for membership of the FPA signed on 4 February 1994, and accepted by the Association shortly after, Cassimatis agreed to be bound to contribute \$100 as his guarantee as a member of a company so limited.

The consequence of Cassimatis being a member of a company limited by guarantee, is that he and the FPA are governed by the provisions of the Corporations Act 2001. Included amongst those provisions is section 140 which deals with the legal effect of the constitution of a company on the relationship between itself and its members and directors. It provides in part that:

‘A company’s constitution...have effect as a contract:

- (a) between the company and each member;’

In turn the Act provides in section 9 that a company’s constitution includes

‘any instrument...governing the activities of the body or its members’.

3.16 This relationship is generally referred to as the ‘statutory contract’ between the company and the member. As any company law student will know, the terms of this ‘statutory contract’ are quite unlike those in the usual exchange contract: they allow unilateral alteration of the contract by the members of the company in general meeting; the statutory contractual terms can only be altered on the terms of the Corporations Act or such other terms as the company’s constitution provides; there is no jurisdiction in the courts for rectification of the statutory contract because it does not accord with the parties’ intentions; there are obstacles to enforcement of the contract, because the company (through its board) is usually the only plaintiff which is recognized as able to sue on the contract; there are doubts about whether damages are available for the breach of the ‘statutory contract’ and finally, any action on the ‘statutory contract’ passes with the shares on which the membership depends. In the case of the FPA, being a company limited by guarantee, membership depends on the guarantee which Cassimatis gave, rather than shares.

So Cassimatis’ objection in his appeal letter of 19 November 2010 that:

‘The FPA must prove that Mr Cassimatis has at some stage entered into a contract under which he has agreed to be bound by the Constitution. This would typically be

done through the membership application form...evidencing the contract under which Mr Cassimatis agreed to be bound by the Constitution'

is largely beside the point. It is beside the point because once he agreed to become a company member bound by guarantee, he was also bound by the 'statutory contract' as described above. That 'statutory contract' of course, allows the FPA to alter the terms of the contract unilaterally, for those changes to affect all members without individual negotiation, and for there to be very, very limited recourse to members to object to the terms of the contract as so altered from time to time.

3.17 Now it is open to Cassimatis to object that the Code of Ethics and Rules of Professional Conduct Regulations are not part of the Constitution of the FPA and hence not given force and effect as a statutory contract by section 140 Corporations Act. The objection is not however, likely to be successful. This is firstly because of the generous definition of 'constitution' in section 9 of the *Corporations Act*. Secondly, as Justices McHugh and Gummow wrote in *Bailey v New South Wales Medical Defence Union Limited* (1995) 132 ALR 1.

'However, the broad trend of authority referred to above, particularly since *Hickman*, has been to identify the subject-matter of the "statutory contract", so far as concerns the relations between the corporation and the members, not as commercial rights but as the government of the corporation and the exercise of the constitutional powers of the corporation.'

3.18 In this case the Code of Ethics and Rules of Professional Conduct was not only something Cassimatis expressly agreed to observe in his application for membership, but it was something that bound every member in their capacity as member. Far from being a collateral commercial benefit (such as the professional liability indemnity provided to Bailey by the NSW Medical Defence Union Limited, or sale revenue earned through co-operative associations of primary producers), the FPA Code and Rules, imposes an obligation on every member. It was and is implicit in the purpose of FPA membership, that members are held to higher professional standards than those who are not members. They agree as an incident of membership, to conduct their financial planning activities according to the standards in the Code of Ethics and Rules of Professional Conduct.

3.19 As in *Hickman v Kent or Romney March Sheep-breeders Association* [1915] 1 Ch 881 referred to by Justices McHugh and Gummow in the quote above, all the FPA members including Cassimatis agreed to make themselves subject to the FPA's procedures for the enforcement its Ethics and Rules. In the *Hickman* case, a requirement in the company's articles that disputes were referred to arbitration was held to be a feature of membership applying to all members, and binding through the 'statutory contract'. The obligations of the FPA's Code of Ethics and Rules of Professional Conduct are of the same quality and also bind all members. In the light of authority, they too should be seen as an incident of membership and part of the 'statutory contract' effective to bind Cassimatis as a member, because of section 140 Corporations Act. A 'statutory contract' which can change over time, without express consent from

Cassimatis, because it operates according to principles of company law, not principles of ordinary contract law.

3.20 Accordingly, the traditional objections that could be leveled against the disciplinary decisions of unincorporated associations or clubs, that the tribunal has no jurisdiction over the conduct of the member unless a property, contractual or economic right infringed by an unreasonable restraint of trade could be shown, are no longer effective. Once it can be shown that Cassimatis is a member of the FPA, and that there are constitutional rules dealing with the professional conduct and discipline of members, the *Corporations Act 2001* machinery means he is subject to the jurisdiction of the CRC and this Appeal Panel.

3.21 *Was there a ‘complaint’?*

The FPA Disciplinary Regulations at paragraph 1.2 provide that a ‘Complaint’ is ‘an expression of dissatisfaction or grievance made to the FPA by a Complainant in relation to the conduct of a Member where a response or resolution is explicitly or implicitly expected ...’ A ‘Complainant’ is someone who makes a complaint. In paragraph 2.5 of their determination the CRC Panel wrote:

‘Between March 2009 and August 2009, the FPA Investigation Officer interviewed Mr W and assisted him in the development of a statement of complaint, which formed part of the formal complaint document outlined in Annexure A to the FPA’s Notice of Breach, issued on 3 September 2009.’

3.22 In response to this Cassimatis appeals that having the Investigation Officer assist Mr W with the development of the original complaint is inconsistent with the disciplinary procedures. Cassimatis alleges that this assistance puts him in jeopardy that the allegations bought by the FPA have been manipulated by the FPA for its own purposes.

3.23 The FPA Disciplinary Regulations are very open about how a complaint might be made: it specifies neither writing nor any particular content for the initial complaint. The definition of ‘Complaint’ is very general, requiring only ‘an expression of dissatisfaction or grievance... where a response or resolution is explicitly or implicitly expected ...’ The only requirements are that the complaint is not trivial, frivolous or vexatious, that the basis of the complaint did not arise more than six years previously and the complaint is capable of constituting a breach (Disciplinary Regulations para 5.1). There seems no doubt to us, that having paid fees of \$196,086 and lost \$700,000 in the six months since they started investing with Storm Financial that the W would have a prima facie case for ‘an expression of dissatisfaction or grievance... where a response or resolution is explicitly or implicitly expected ...’ and that such a complaint was made by them to the FPA.

3.24 Thereafter the Investigation Officer can decide how in the circumstances the investigation can best be carried out. The FPA’s Disciplinary Regulations

provide at paragraph 5.2 that the Investigation Officer has a wide discretion in deciding how to investigate a complaint, including '(a) requesting information from the Complainant and other witnesses;' If the Investigation Officer considered that asking Mr W for information which found its way into the Annexure A to the FPA's Notice of Breach, was a useful way to conduct or record the fruits of conducting the investigation, then the FPA Disciplinary Regulations permit him or her to proceed that way.

3.25 Cassimatis has provided not one shred of evidence that the complaint or investigation process has been used by the FPA 'for its own purposes'. Here we assume that Cassimatis means that those 'own purposes' are outside its organizational mandate generally, and in particular outside the FPA's Disciplinary Regulations. If the member is going to assert breach or abuse of process, then for the claim to be taken seriously, he must be able to point to some grounds, legal or factual. He has been able to point to neither. Accordingly, we conclude that the complaint was properly made by the W, that it was properly investigated and recorded by the Investigation Officer, and that this point of appeal fails.

3.26 *Was Cassimatis engaging in 'professional and business activities' as a financial planner? Did Cassimatis give 'advice' or were the warnings he alleged he gave the clients effective to 'disclaim' an advisory context?*

Cassimatis argues in his appeal that his activities with the W did not amount to giving financial advice or making recommendations. He argues that this was so because he gave them oral general warnings and he asserts he gave them a written warning on a slide. The warnings were all to the effect that Cassimatis was not giving the W financial advice and that he would make no recommendations. He argued that he was only giving them information, and explaining to them the feasibility of various scenarios using different numbers from their own financial information, to work out exactly what strategy would work for them. He alleges he told them that the recommendations would come later in the SOA.

3.27 Unlike the Corporations Act which requires that 'financial advice' or some other type of 'financial service' must be provided before its provisions apply, the FPA Rules and Ethics are wider in their scope. For example Rule 101 contains a prohibition on misleading and deceptive conduct by a member 'in the conduct of professional and business activities' a rule with a much wider scope than requiring a 'recommendation' to be made. However, other FPA Rules and Ethics have narrower scope, such as rule 110 which requires an 'oral or written recommendation to clients' to be prepared before there is an obligation on a member to ensure that only suitable strategy or plans are presented to the client. These observations in turn, raise the following questions directed to Cassiamtis' appeal argument that he did not give the W financial advice.

3.28 *When is the conduct of a member such that it 'relates to conduct of professional and business activities' (Rule 101)?*

While some of the FPA rules depend on there being a 'recommendation' made, the operation of Rule 101 by contrast, depends on the conduct of the member being that 'which relates to conduct of the member's professional and business activities.' Cassimatis' appeal argument that he did not give financial advice or make a recommendation, seems on the face of this text, to be a distraction from the main point. That point is whether the alleged misrepresentations made to the W were 'in the conduct of professional and business activities'. Put another way it means that if Cassimatis made a misleading representation in his business outside 'advising' or making 'recommendations' it could still be conduct caught under rule 101. We consider that Cassimatis' 'professional and business activities' included conferring with individuals seeking financial services to attract them as clients. An aspect of this would ordinarily include giving information and working through scenarios that prospective clients would find sufficiently attractive to become clients. We think that even if we are wrong in our conclusion below that Cassimatis gave financial advice and made recommendations, that in his teleconference with the W he was definitely conducting 'professional and business activities'. Whether in the course of those 'professional and business activities' there is evidence to show he misled the W, is something we consider further below in this appeal determination.

3.29 *When is a 'recommendation' made (Rule 110)?*

As we have pointed out already, some of the FPA Rules and Ethics speak of an advisor making a 'recommendation' (eg in Rule 110). Many obligations flow from the making of a recommendation, most relevant for this determination, the suitability obligation. However, the FPA Rules do not clarify what a recommendation is, and when it is made.

3.30 Although reference to legislative definitions and standards is not always dispositive of matters under the FPA Rules and Ethics, they may provide a guide where those rules are silent. This is because regulatory regimes like the Corporations Act provide rules by which many parts of a financial adviser's business are conducted. To adopt definitions derived from those rules to give meaning to the less elaborated FPA Rules and Ethics may be justified for a number of reasons. First, most financial planners are regulated by both the FPA's rules and the Corporations Act and would likely give duplicated rules the same meaning unless the FPA rules provide something different. Second, that approach provides for an overall regime that is simpler to understand and comply with. Third, although their terms may mean they differ in some aspects (eg in scope) it makes sense to see the FPA's Rules and Ethics as broadly parallel in purpose and complementary in effect with the Corporations Act. Many of the regulatory aims and purposes of the FPA (eg improving the quality of financial advice) are also promoted by the Corporations Act. It makes sense then for a self-regulatory regime such as that operated by the FPA to incorporate the concepts and meanings of the legislative regime where their rules are silent. We do so here.

3.31 Although the Corporations Act does not define 'recommendation' either, it does use the term in a fashion that allows us to identify what sort of advice it

refers to. The Corporations Act also specifies the circumstances in which a recommendation is held to have been made as follows.

The Corporations Act defines financial product advice as

S766B(1) 'a recommendation or a statement of opinion, or a report of either of those things, that:

- (a) is intended to influence a person...in making a decision in relation to a particular financial product ...; or
- (b) could reasonably be regarded as intended to have such an influence.'

The Corporations Act also provides for two types of financial advice. Personal advice and general advice (s766B(2)-(4)). Personal advice is defined as

S 766B(3) 'advice that is given or directed to a person in circumstances where:

- (c) the provider of the advice has considered one or more of the person's objectives, financial situation and needs...; or
- (b) a reasonable person might expect the provider to have considered one or more of those matters.'

It seems to us that the FPA Rules and Ethics provide for information seeking about the client, product research and analysis and disclosure upon the making of a 'recommendation' in a fashion similar to that stipulated by the Corporations Act when personal advice is to be given. In particular we note that the making of a recommendation amounts to personal advice under the Corporations Act when either a provider has in fact considered one or more aspects of the client's personal circumstances, or a reasonable person would have come to that conclusion.

3.32 Therefore we conclude that unless the FPA changes its rules, a 'recommendation' is made under the FPA rules in the same circumstances as the giving of personal advice under the Corporations Act. This legal conclusion that a 'recommendation' under the FPA rules is not as wide as general advice under the Corporations Act, is corroborated by the views of the CRC's practitioner members. They consider that most FPA members would consider a 'recommendation' under the FPA rules to be approximately the same as 'personal advice' under the Corporations Act. The question which we deal with further in its factual context below then becomes: was what Cassimatis said to the W intended to influence them, or conduct that a reasonable person would think was intended to influence them?

3.33 *What is the effect of a general advice warning?*

Finally, we have to address the quality and effect of a 'General Advice Warning' and whether it can turn what a reasonable person would think was a recommendation, into mere general advice. Clearly, this general advice warning can make no difference in relation to the prohibition on misleading

conduct in Rule 101. This is because as we have shown already, that rule does not depend on there being a 'recommendation' but on pursuit of the member's 'professional and business activities'.

But can the presence of a general advice warning dispel the presence of an advisory situation or the giving of a 'recommendation'?

If so, it would affect the application of the FPA rule 110 which requires recommendations be suitable for the client. To start with the FPA rules are completely silent on this question. There is simply no warrant from the text of those rules to permit a personal 'recommendation' to become general advice, through giving a warning.

- 3.34** That leads us to a further question: is there warrant for making the FPA rules subject to the general advice warning provision in s949A of the Corporations Act? In some instances where the FPA Rules are ambiguous, the CRC has used analogous provisions of the Corporations Act as a source of interpretive guidance. Here of course, the circumstances are relevantly different, for the FPA rules are not ambiguous about general advice warnings, they are completely silent.

As the facts fall, we consider that in this instance we do not have to answer the question of whether the FPA rules should be seen as subject to the general advice warning provision in s949A of the Corporations Act. This is because even if the answer is 'yes' in principle, on the current facts s949A cannot apply to relieve Cassimatis from the obligations of a personal advice situation. This is because the terms of s949A require that the 'advice has been prepared without taking account of the client's objectives, financial situation or needs.' The evidence is clear that Cassimatis had the W's detailed financial information. It was from this that he put figures into the financial modeling program that he used to produce various scenarios for the Ws. Indeed it is clear from the evidence that the Ws thought he was doing just this. In the circumstances, it seems a reasonable person might have expected Cassimatis to have considered one or more of the Ws 'objectives, financial situation or needs.' In short even if s949A could apply to the FPA rules (despite their silence on this point) to allow a general advice warning to turn a recommendation situation into a general advice situation, the terms of the *Corporations Act* section do not apply here on the facts.

Therefore we conclude a general advice warning given under FPA Rules could not in this case, turn personal advice into something less – general advice, financial fact or mere opinion.

4.0 CHARGE 1 - breached Rule 101 of the FPA Rules of Professional Conduct

4.1 The Panel failed to apply the prescribed standard of proof and improperly imposed the burden of proof on the member;

The legal discussion above of the *Briginshaw* principles indicates that the Disciplinary Tribunal had to be 'reasonably satisfied' that the evidence brought by the FPA had proved its breach allegation. But did the Panel have to be satisfied at a higher level because this is a 'livelihood' or 'loss of reputation' case? It is true that the FPA's allegations are serious for Cassimatis in that he was likely to lose reputation if found to have been in breach. At the same time, a finding that the allegations had been proved was going to be less serious because expulsion or fining by the CRC was not going to provide an obstacle to Cassimatis carrying on business as a licensed financial services provider in Australia. Banning from holding a financial services license (and hence inability to practice at all) is the province of ASIC or the Administrative Appeal Tribunal (AAT) or the courts.

4.2 This is an important distinction, for to the extent some commentators fear that the wide dicta in *Rich v Australian Securities Commission* (2004) 220 CLR 120 at 144-45 may apply to domestic disciplinary tribunals, that case involved a disqualification by the Court under the Corporations Act so that *Rich* could not continue to act as a company director for 20 years – essentially a life-time ban. That is not the case here. This is not a livelihood case, though there is no denying that the publication of Cassimatis' expulsion from the FPA is a serious setback for the member's professional reputation. While having 'reasonable satisfaction' to a weight commensurate with the potential damage to Cassimatis' reputation, it is still the case that the Disciplinary Tribunal needs only to be reasonably satisfied that the FPA has proved its case. The FPA does not have to go further, and banish doubt in the minds of the CRC members. Further, the FPA's Disciplinary Regulations in combination with the *Wednesbury* principle, mean the Panel has significant latitude to decide what evidence it finds persuasive, and decide what weight to give it.

4.3 Turning now to the evidence relied on by the Panel in its finding that Cassimatis had breached FPA Rule 101. Was the evidence provided by the FPA sufficient to make the Panel 'reasonably satisfied' of the fact of the conduct alleged given that there could be damage to his reputation? Or did Cassimatis's evidence in reply so damage the FPA's case that the Panel could not have found itself 'reasonably satisfied' that the breaches alleged were proved? Adopting the reasoning above, about who holds the onus of proof, we proceed on the basis that it is the FPA and not the complainant. It is clear that the Panel had properly informed itself of the standard of proof – it correctly states the standard it is adopting in paragraph 14.6 of the determination.

4.4 It is also clear from the transcript of evidence, and from the Panel's reasoning, that the only ground on which the determination of this charge was reached, was 'That the return on Australian shares over 10 to 20 years was not 13% pa as represented by Mr Cassimatis.' There is simply no evidence brought by

either party, and no argument made at the hearing, about the other two grounds. The Panel's determination is quite silent about them as a result. There is no requirement for the FPA or the Panel to use all the grounds alleged in respectively making or determining the case. We therefore reject the part of Cassimatis' appeal that asserts this part of the determination to be defective because the Panel did not state which ground it was relying on. This is clear as we have said, from the transcript and the reasons that were given: it was the 13%pa return ground.

The transcript shows that no evidence was bought by Cassimatis to refute that he made the statement to the W on 29 April 2008, that the average return on Australian shares over a 10-20 year period was 13% pa. Indeed he provided the FPA Investigation Officer with material that sought to prove the truth of that statement. The W gave clear evidence that such a statement was made to them. The Panel accepts at paragraph 14.14 of its determination that Cassimatis' statement was likely to be literally true. As a result the complaint that the Disciplinary Tribunal failed to give appropriate weight to Cassimatis evidence about this matter because it was downloaded from the ASIC website in early 2010 and not contemporaneous with the breach, falls away.

- 4.5** The core issues, of whether the statements were misleading, and whether they were proven to the requisite standard remain. This is because a statement while being literally true, can nonetheless be misleading. This is a mixed question of law and fact. We think the Panel stated the law in this matter correctly at para 14.11 of its determination where it said: 'The overall impression created by the representation or conduct is key.' And again at para 14.14 where the Panel wrote 'It is possible for factually true statements to be misleading if the associated circumstances contribute to error or misconception.'
- 4.6** As a matter of fact the FPA argued and the Panel found that Cassimatis failed in the meeting of the 28 April 2008 to qualify the average returns figure of 13% pa, with advice about the stability or volatility of that return: in short Cassimatis allowed silence about the associated volatility in returns (the risk) to contribute to error and misconception by the Ws. The FPA bought evidence and the Panel found that this omission was compounded by the absence of such a qualification in the SOA or any other piece of advice given to the W by anyone at Storm Financial. This is even though the W gave evidence that one of the express purposes of the meeting with Cassimatis was to ask questions and seek assurances about the very question of riskiness of the Storm advice. Speaking about the representation as to 13% pa returns to shares, the Panel made an express finding of fact as to this omission at para 14.25: 'Further the representations caused the W to infer these returns were sustainable and would lead to a greater financial benefit than if they chose the allocated pension strategy that they were also considering....The Panel has concluded that in the whole of the circumstances a reasonable person in the W' position would have reached the same conclusion.'
- 4.7** Cassimatis complains in his appeal that the FPA failed to provide evidence of misleading conduct on which the Panel could be 'reasonably satisfied'. He

says in other places that the Panel placed the burden of proof (as opposed to the standard of proof) on him rather than the FPA. We disagree. There is plenty of evidence brought by the FPA on the statements about the 13% pa average rate of return – in the end that was uncontroversial, everyone was ‘reasonably satisfied’ or better.

- 4.8** The FPA also had to prove that Cassimatis had failed to qualify his statement about 13% pa returns. The FPA proved that no qualifying statements about volatility or risk were made, by Cassimatis or by anyone else at Storm. The W gave clear evidence that the confident and emphatic quality of Cassimatis’ advice including the 13% pa returns representation, had the assurance of a guarantee about them. As the Disciplinary Panel found, Cassimatis provided no evidence of reasonable grounds on which he could justify the absence of conditioning words about risks, especially volatility. The clarity of these findings by the panel, allows us to conclude that the panel was ‘reasonably satisfied’ to a degree sufficient to recognize the potential damage to Cassimatis’ reputation. Further, having Cassimatis undertake the common sense task of rebutting the case to answer on this charge which had been made out by the FPA, is not illegitimately shifting the onus of proof from the FPA. It is simply the practical business of the member adducing evidence to refute the FPA’s case, something that Cassimatis failed to do.

In short, the Panel properly directed itself about the standard of proof. The Panel applied that ‘reasonable satisfaction’ test to the unchallenged evidence (both oral and documentary) of misrepresentation by omission bought by the FPA. Cassimatis bought no evidence at all to demonstrate that he had good grounds for giving his advice to the W in the unlimited fashion he did. Instead he relied on a technical argument that he had not given them advice at all, because he had given a general advice warning. That argument the Disciplinary Panel rejected, and for the reasons set out above we agree.

- 4.9** In conclusion the case to answer of misrepresentation by omission was made out on the evidence bought by the FPA that Cassimatis failed to tell the W that average returns can be very volatile. The evidence shows this led the W to think that the literally true statement that the Australian rate of return on shares was an average of 13% pa was much safer and surer than it was. The FPA’s evidence was perfectly capable of leading the Panel to conclude on the balance of probabilities properly weighted for the seriousness of the consequences to Cassimatis’ reputation that his conduct had amounted to a material misrepresentation.

4.10 *The Panel Failed to Give Proper Reasons*

Ground 6.8 of the Notice of Appeal claims the panel failed to give proper reasons for its decision on this breach. Cassimatis appears to be alleging that the tribunal has not given any reasons at all, (which is clearly not the case) or was being unreasonable, or lacked good faith. We have already pointed out that it was on the representation that average rates of return to Australian equities was 13% pa that the initial panel decision was made in relation to charge

1. The other two allegations particularised in the breach notice were not the subject of either evidence or argument, and did not provide a basis for decision.

- 4.11** More particularly, Cassimatis alleges that paragraph 14.25 of the panel's determination which deals with the representation that average rates of return to Australian equities was 13% pa, does not contain sufficient reasons. Paragraph 14.25 states the panel's conclusion: the reasons are provided for in the 20 or so preceding paragraphs, where the panel identifies and discusses its assessment of the relevant evidence. It concludes that the W were materially influenced by Cassimatis representation, and that a reasonable person would likewise be influenced. We do not agree that the panel failed to give any reasons, nor do we agree that the reasons they gave were unreasonable or lacked good faith. To us the reasons are comprehensive of law and fact, logical and persuasive.

We conclude therefore that the appeal on charge 1 should be dismissed.

5.0 CHARGE 2 - breached Rule 110 of the FPA Rules of Professional Conduct

There are two overarching arguments adopted by Cassimatis in response to the determinations of the Panel that he breached Rule 110 of the FPA Rules of Professional Conduct, and gave unsuitable advice to the W at a meeting on 29 April 2008.

- 5.1** The first argument, though made from a number of differing standpoints, is that Cassimatis did not give the W financial advice or a financial planning recommendation. Therefore, goes the reasoning, he could not have failed to make that advice 'suitable' as the FPA Rules and Ethics require.

The second argument goes this way. Again from a number of angles, it argues that in fact the advice was suitable, because the W had already taken some steps towards the destination to which Cassimatis ultimately directed them. Another aspect of the member's appeal on this breach is that the Panel based its reasons for finding Cassimatis had contravened the FPA suitability rule, on grounds that were not specified in the FPA's Breach Notice. The Panel found that one aspect of the unsuitability of Cassimatis' recommendations to the W was advice that they should switch investments, cashing in their superannuation assets and a piece of real estate, to invest in the Storm Financial badged index funds into which they placed all their investment assets.

We now deal with each of these arguments in turn.

5.2 *Did the Member Give the Clients a Financial Planning Recommendation?*

In our discussion of legal matters set out above, we have come to some conclusions that are partly dispositive of the first of the above overarching arguments on this ground of appeal. We have concluded (in line with prior determinations) that a 'recommendation' is made under the FPA rules in the same circumstances as the giving of personal advice under the Corporations Act. As we have said the Corporations Act also provides for two types of financial advice. Personal advice and general advice (s766B(2)-(4)). Personal advice is defined as

S 766B(3) 'advice that is given or directed to a person in circumstances where:

- (a) the provider of the advice has considered one or more of the person's objectives, financial situation and needs...; or
- (b) a reasonable person might expect the provider to have considered one or more of those matters.'

Looking at the Panel's reasons for finding that Cassimatis did give the W personal financial advice, or in the language of the FPA's rules that Cassimatis made a 'recommendation', we see the discussion of a number of matters. These circumstances would lead a reasonable person to consider the W had been given advice that took into account their personal circumstances. So for example at paragraph 14.31 the Panel discusses the length of the meeting, the fact only the W were present and that Cassimatis specifically used the W own financial figures in modelling their capacity to repay debt. The level of detail of the discussion even included the amount of Storm Financial's fees. In paragraphs 14.33 and 14.34 the Panel discusses the evidence given by Cassimatis himself that many times before with other clients, he had played a role similar to that played with the W. This led the Panel to the conclusion that Cassimatis had taken on a role as 'the most senior financial adviser within the group.'

5.3 *Financial Planning 'Recommendation' Given?*

The grounds of appeal made much of the fact that the Panel's conclusion that Cassimatis gave the W financial was perverse. This is said to be because it means that someone in Cassimatis' position (or indeed any financial adviser) could not go through schematic alternatives in order to decide on the direction of advice for a particular client. Cassimatis called this process one of examining 'what if' scenarios. But the problem with these allegations of perversity and going back to the definition of 'personal advice' or 'recommendation' is that 'what if' discussions generally happen right at the beginning of a client relationship, not after it has been going sometime.

True 'what if' scenario discussions are designed to sketch cartoons of advisory alternatives, with the full picture completed once a scenario has been selected. They are not for the purpose of persuading a client to go firm on the only scenario on offer, and at the end of the advisory process. They are not designed, as the Panel so vividly put it, to induce a 'tipping point' in the

decision of a client to commit to the only strategy being discussed. Whatever the advisory status of 'what if' scenarios (and we leave that for another day) one on one discussions, calculations using client data and at the end of a lengthy advisory process would be seen by reasonable people as intending to influence an investment decision and hence amounting to a recommendation.

5.4 *Giving Advice in Teams*

We want to make another point relating to this first overarching argument, about the role and presence of Mr Dowie. He had been and continued to be the W' main financial advisor. One plank of Cassimatis' argument that he did not give the W advice was that they already had an advisor who continued with them, and that was Mr Dowie. The CRC has recognized in other determinations, the growing trend of delivering financial advice in teams. It has concluded that just because a client may have a main advisor on their account, does not mean that others drafted in for particular tasks, or with particular expertise, are not giving advice too. They may be, and in this respect Cassimatis was no exception.

We accept that the principal of an advisory firm who comes in for five minutes to welcome a new client, would likely not be giving financial advice. However, the circumstances here were a far cry from that. The Panel gave detailed discussion of the evidence of the meeting on 29 April 2008 and concluded that it was Cassimatis' influence which finally persuaded the W to go ahead. Given the law outlined above, we consider there is no reasonable alternative but that Cassimatis made financial recommendations to the W as part of a team.

5.5 *Giving General Advice Warnings*

The final thread of Cassimatis' first overarching argument in this appeal, is that Cassimatis gave the W warnings that he was not giving them personal financial advice: that at the most he was giving them general financial advice, and not making recommendations. He argues that these warnings had the effect of turning what otherwise might have been construed as personal advice into something less, and consequently removing many of Cassimatis' responsibilities, including the requirement to give only advice that is suitable.

Allied to this in the member's appeal points is the assertion that the Panel failed to give sufficient weight to the legal arguments and to the evidence that the warnings were given. Cassimatis argues that as there was no evidence to refute his assertion that he gave the general advice warnings and that, the Panel has no alternative but to find that they were given.

5.6 We have addressed above what we see as the legal effect of giving general advice warnings under the FPA Rules and Ethics. The FPA Rule are silent and do not provide for or assign any effect to such warnings. The Corporations Act provision which might perhaps be marshalled as a source of such a rule does not apply on the facts of this case, even if it could apply in principle. We see no basis for the view that a general advice warning, on its own, makes otherwise personal advice, general advice, or dispels the presence of an advisory situation.

Even if an FPA rule allowing general advice warnings applied, it could at best be used as evidence to corroborate other facts showing that the provider of advice was not considering a person's objectives, financial situation and needs; the warning by itself cannot dispel what is in fact an advisory situation because other factual features of advice giving (eg using client's own financial facts) are present. ASIC states in Regulatory Guide 175.29 that the giving of a general advice warning is not a determinative factor in distinguishing between personal and general advice, but rather one factor to be considered.

- 5.7** As part of his challenge to the Panel's finding on this argument the member has argued that the Panel's determination was wrong on the evidence. He argues this because no evidence was provided to refute his assertions that he gave the general advice warning. The member asserts the warning was given orally by him three times in pages 28-32 of the transcript. He also asserts that the warning was given in writing in a power-point slide, shown to the W at the meeting on 29 April 2008.

The Panel determination makes clear that only two slides of a presentation of 16 slides were shown. There was no corroborating evidence to establish that one of these was a slide containing a warning in fact shown to the W. Evidence corroborating the showing of the warning slide from the only other person at the presentation, Mr Dowie, was never forthcoming. This means that there never was evidence the Panel could rely on, that the warning had been given in writing. The Panel dealt with the effect of the oral warnings by concluding that even if they had been given they were insufficiently explained to be effective in letting the W understand that Cassimatis was not giving them advice (paras 13.27-13.28). As we have explained it, Cassimatis' position is even weaker than this: we think that there is no basis in this case for thinking there is a rule which allows general advice warnings to be effective at all, let alone that they would have the automatic effect the member contends.

- 5.8** Having established that on the facts and the law the Panel was correct in finding that Cassimatis did give financial planning advice to the W, we now turn to the other question on this appeal point: was the Panel correct in finding that the member had made unsuitable recommendations to the W?

5.9 ***Was the Member's Financial Planning Recommendation in April 2008 Suitable?***

The material words of FPA Ethics and Rules 110 require the planner to 'develop a suitable strategy or plan for the client'. This plan must be 'based on the relevant information collected and analysed' a reference to the requirement to collect information from the client in FPA Rule and Ethic 108. These two rules operate together, and are two sides of the one coin. The planner collects information from the client to make an assessment of the type of strategy or plan that would meet the client's needs.

- 5.10 *The Nature and Content of the Recommendations:*** Cassimatis criticizes the Panel's characterization of the recommendations made to the W – he argues they are not recommendations or that they are not recommendations made by him. The subtlety that the member seeks to exploit here is that there is a mix of express and implicit recommendations made to the W. On pages 50-60 of the statement of advice dated 16 May 2008, it is possible to identify both express and implicit recommendations on which the W relied. The express ones (SOA p50) are that the W make purchases of specified assets and borrow amounts through margin and home loans.
- 5.11** Implicit in these recommendations are others (and one might ask why they were not spelt out) that the Panel identified on page 41 of its determination. These recommendations are implied by necessity, for otherwise the express recommendations cannot be understood or operationalised. The first implicit recommendation identified by the Panel is that the 'W divest themselves of specific assets' (Panel determination para 14.37). Further reference to page 23 of the statement of advice makes clear that the express recommendations assumed 'that we have coordinated the withdrawal of your superannuation funds in full and the proceeds of approximately \$900,000 have been placed in your cash reserves, to be used for the purchase of growth assets.' This implicit recommendation includes the sale of the W' real estate to add to the cash reserves also for purchase of growth assets (statement of advice p23). It strongly implies that Storm Financial would implement the switch to cash of the superannuation assets at least, and encouraged the same with the real estate. We consider this is clear evidence in the member's own document that there was a recommendation that the W sell their existing assets, and the Panel identified it correctly.
- 5.12** There is a second implicit recommendation also identified by the Panel (determination para 14.37) and necessary to explain the implementation of the express recommendations. It is that the W should have a certain level of annual income from the strategy they were advised to adopt. It is only in the pursuit of this level of income, which by his advice Cassimatis encouraged the W to believe they could enjoy, that the rest of the recommendations express and implicit can be understood. On page 30 of the statement of advice there is a statement that 'The plan will provide you with an income for living expenses of \$110,000 per annum and will also meet your loan repayments.' This is followed up by a slightly more modest figure of \$85,850 from July 2009 in the cash flow analysis in Annexure B of the statement of advice. This cash flow analysis in Annexure B is expressly incorporated into the statement of advice by reference on page 22. So the recommendation implicit from necessity that the W should have a certain level of income is at the centre of the discussion of the strategy which culminates in the express recommendations on page 50.
- 5.13** We acknowledge that it is unusual to consider a statement that a client could obtain a certain level of income as a recommendation. It is not, as the member points out in his appeal letter 'in the nature of a recommendation because it is not advice as to a course of action.' However unusual it may be to describe a statement of annual income as a recommendation that is the

function the statement performs in this case. This is because without this implicit recommendation, the rest the advice as to the purchase of assets and borrowings does not make sense. It would be artificial in the extreme to deny that the statements about income were recommendations, just because they did not appear in the form that recommendations usually do. That they were crucial to the rationality of the express recommendations is clear.

- 5.14 *Was it a Suitable Strategy?*** Development of a suitable strategy may require the planner not only to develop a plan from the client's information, but also to access or do research to identify which interests or instruments (ie which products) are suitable for the client. The identification does not have to result in recommending the 'best', the rule requires only that what is recommended is suitable. In short the FPA Ethics and Rules prescribe a two step approach to a suitable recommendation: collection and analysing of client information to identify client needs and research and analysis to match the needs with suitable recommendations (usually but not always, acquiring financial products). The overall result is the development and implementation of a financial plan.
- 5.15** There two related points about the suitability obligation on advisers. The first point is that the adviser must match the plan and its implementation to the client's needs, not the client to the strategy and products. If the plan or strategy and its implementation is not based on meeting needs it will not satisfy the suitability obligation. Put shortly, the advice must be 'client centric' not 'product centric' or 'strategy centric'.
- 5.16** Secondly, the role of the financial adviser is to discern the client's needs and put them into financial terms. Those needs include the need for the client to be at peace with the level of risk they assume when the plan is implemented. That need may well convert into different (and lower earning) financial terms for risk averse clients than for those who are perhaps younger or for other reasons may tolerate higher risk. The risks need to be disclosed to the client in terms the client is likely to understand (FPA Ethic and Rule 111).
- 5.17** It is not the prerogative of the planner to either ignore the risk preferences of the client or to train them to accept (or appear to accept) a higher level of risk than they wish to assume. The role of the planner is to develop a plan that is suitable for the client's needs, including the need to be content with the risk levels assumed. It is certainly not part of the role of the planner to act as a hidden persuader to get the client to believe they have financial needs greater than they do: for example that they need an income of \$110,000 or \$85,000 when they have stated their satisfaction with lesser amounts. It is also no part of the planner's role to coach clients to take on risks (which may not be properly explained) that they do not feel thoroughly comfortable with. Both these examples are, reverting to our prior point, attempting to mould the client to the strategy, not the strategy to the client. They amount to a breach of the suitability obligation and depending on the degree to which the client's instructions about risk have been ignored, may also involve a breach of the express terms of the client mandate.

- 5.18** We specifically adopt the reasoning of the Panel as to the unsuitability of the advice given by Cassimatis to the W in paragraph 14.41 of their determination. These reasons should be read with the Panel's discussion of the evidence in paras 9.1 to 9.4 of their determination. Given that at a number of places the W had said that \$60,000 per annum was sufficient for their retirement needs, it was not suitable for Cassimatis to persuade a retired couple such as the W to adopt a highly geared strategy. What is more, they had indicated they were conservative investors, and the recommendations for gearing were not appropriate to their risk preference. They gave evidence that they sought reassurances as to the safety and security of the Storm strategy on a number of occasions, further indicating their conservative preference. A preference which Cassimatis ignored in making his recommendations.
- 5.19** In his appeal the member cites the fact that the Index funds recommended for the W had an overall Beta of one, as evidence of suitability. This point does nothing to address the central shortcoming in the suitability of the recommendations made to the W. The recommendation to invest everything in the funds that will track securities market returns meant that the W portfolio was undiversified in terms of using other asset classes. All their assets were allocated to the securities markets except for their home, and a small amount of cash earmarked for interest and living expenses. The securities markets are at the high risk end of the spectrum of investments. Lack of allocation of any of the portfolio to other asset classes meant the W held no assets that might offset the inevitable volatility of movements in the securities markets. For a retired couple who depended on investments for retirement income, and who had no chance to replace lost assets, the lack of diversity in the recommendations made by the member was deeply unsuitable.

For these reasons we reject the appeal of the member on this second breach found by the Panel.

6.0 CHARGE 3 - breached Rule 110 of the FPA Rules of Professional Conduct

6.1 *Was the Member's Recommendation in the Letter of October 2008 Suitable?*

The Panel concluded that the letter of 8 October 2008, contained recommendations made without reviewing the W's personal financial situation, and without analysis of what recommendations would actually suit their circumstances. There was not even a notation in the letter, which would have been easy to include, recommending that the W call the advisor at Storm with primary responsibility for their account, Mr Dowie. Advising the W to convert their index funds to cash in October 2008, the member failed utterly to review their quite changed financial circumstances, and to make a suitable recommendation. In recommending going to cash, but not paying down the loans he ignored his clients' very significant interest obligations and the W need to have money to live on.

The suitability obligation is one with which it is not necessary to assess compliance in the light of the consequences of breach. It is a substantially

objective standard to be judged in terms of accepted good practice in the circumstances of and at the time of the giving of advice.

- 6.2** Cassimatis argues that it was the conduct of Colonial first State (CFS) the manager of the Storm Financial badged index funds, that caused the W' loss and not his conduct or that of Storm Financial. There are two points to be made in response to this argument. The first is that loss and its causation is not a relevant consideration for breach of the FPA Ethics and Rules that the FPA alleges Cassimatis breached. All that the FPA needs to show is that Cassimatis's conduct breached the standard of conduct required by the rules. This proposition is perhaps most easily grasped in relation to the obligation not to bring the profession of financial planning into discredit. The relevant moment for determining whether the rules have been complied with is generally the point of giving advice to the client or entry by the client into the customer contract with Storm, or of implementation of advice. That would be the case in an allegation of breach of the suitability requirement. The same will usually apply to an allegation of misrepresentation.
- 6.3** The second point is that even if it were the case that loss had to be shown before there could be a breach of most of the FPA Ethics and Rules, it is not necessary in the general law of causation for the act of the adviser to be the only or even the primary cause of loss, before he or she could be liable. It is sufficient in most legal settings where causation is relevant, that the act of the party facing liability was a relevant causative factor – that 'but for' the act of the potentially liable party, the loss would not have been suffered. It is obvious that in this case, if it were not for the conduct of Cassimatis in recommending the strategy he did to the W, they would never have suffered the loss they did. However, as we have pointed out already, loss is not a relevant factor in the proof of breach of the FPA Ethics and Rules, and so we do not have to delay further on this point. It is also unnecessary for the FPA to prove the W' loss to make out its case.

On this breach too, and for these reasons, we reject the member's appeal.

7.0 CHARGE 7 - breached Ethics Principle No. 6 of the FPA Code of Ethics

It is argued by Cassimatis that his conduct did not amount to unprofessional behaviour. Further, he argues, that the Panel took into account matters (conflicts of interest and size of fees charged) that were not included in the breach notice from the FPA.

- 7.1** The Panel found that Cassimatis made serious misrepresentations in advising the W. These representations had the effect of assuring the W that the Storm investment strategy was safer and less risky than it really was. We have found there was adequate evidence before the Panel to make such a determination and that the proper standard of proof was observed. We have also found that the Panel directed itself properly as to the law, especially when finding that

Cassimatis had been giving the W financial advice in the meeting of 28 April 2008.

- 7.2** The Panel also found a serious breach of the suitability requirement in the FPA Rules, not once but twice in relation to the same clients. Again, we have found that there is sufficient evidence of departure from the suitability requirement and that the Panel directed itself correctly on the standard of proof and the applicable law. The W came to the meeting on 28 April 2008, with questions specifically about the level of risk of the Storm strategy all of which went to its suitability for them. As we have found in relation to the misleading conduct breach there was more of an attempt to distract from a proper assessment of the risks of the Storm strategy by assurances of safety and security than an attempt to properly spell out the risks the W were being asked to take. This served to undermine the member's discharge of the requirements of the suitability rule as well.

We agree with the Panel that Cassimatis' conduct in breach of FPA Rules 101 and 110 would mean that ordinary people would consider Cassimatis' behaviour did bring the financial planning profession into disrepute. They might think that all financial planners would act as the Panel found that Cassimatis has done and we agree that is sufficient to found a breach of Rule 6.

- 7.3** On two related points we find however, that we must disagree. The Panel found at para 14.47 of its determination that the member's failure to manage conflicts of interest inherent in his dealings with the W was a component which contributed to the Panel finding that Cassimatis had acted unprofessionally. Similarly it concluded that the level of fees charged to the W 'was in our opinion completely unjustified' and that this too brought the financial planning profession into disrepute. Neither of these matters was particularised in any part of the breach notice. This may have been an oversight on behalf of the author of the breach notice, but it does not justify using the facts as evidence of the breach when no notice of has been given to the member.

- 7.4** It is true that the FPA Disciplinary Regulations at paragraph 9.6(c) allow the CRC to 'not be bound by the rules of evidence, but inform itself on any matter as it sees fit'. That paragraph is immediately preceded by another 9.6(b) which provides that the CRC must 'follow the principles of procedural fairness'. Rule 9.6 itself is headed 'Rules of Evidence and Proceedings Generally'. This collection of provisions, against the background of the foundational principle that a member must know the case they have to answer, strongly suggests to us that the CRC's permission to 'inform itself on any matter as it sees fit' is limited to evidence of grounds already set out in the breach notice or otherwise properly notified to the member prior to, or by agreement, at the hearing of a matter. We do not think that an opportunity to address new matters such as conflicts of interest or the quantum of fees, in a fashion that is procedurally fair, can be given when grounds bubble up from evidence at the hearing but are not formally added to the case that the member has to meet. It is also not the intention of the CRC to allow the

procedure it has adopted of giving members a chance to address the ‘next to last draft’ of the Panel’s determination to become a venue for the airing of grounds and issues that have come to light during the hearing of evidence. We prefer to reserve this procedure for fine-tuning matters where the Panel may have ‘informed itself on any matter as it sees fit’ as a matter relating to evidence and where grounds have already been formally alleged and argued.

- 7.5** Notwithstanding this reservation in relation to the argument of the CRC, about the inclusion of grounds about conflicts and fees, we consider that the Panel’s finding of a breach in the professionalism standard is sufficiently made out by fully tried allegations concerning misleading conduct and suitability, which the member has not been able to answer. In conclusion despite these reservations, we find that the Panel was correct to find that the member had breached the requirement not to bring the financial planning profession into disrepute.

IV. APPEAL DETERMINATION AND REASONS IN RELATION TO COSTS

- 8.1** The member complains of the costs of the hearing of \$12,855.21. These costs partly comprise costs incurred by the FPA in postponing a day’s hearing that had already been arranged, at the member’s request and for the member’s convenience. The member agreed to pay the costs of that postponement, and we have not been given any reason to why that agreement should be considered unfair or otherwise unsafe, especially as the member agreed to it with advice from his legal counsel.
- 8.2** The costs order made by the Panel in relation to the two days that were heard is reasonable. The first day started 20 minutes late only, and that was in deference to allowing the member to appear by phone when the CRC could have compelled him to appear in person. The claim that a second day of hearing was required due to the FPA’s Investigations Officer repeating material in documents is unsustainable. Not only does the FPA have the burden of making the case which the member must answer, but it has to do that by taking evidence from the complainant and other witnesses. The FPA must make legal arguments. This was all done in a complex case, and the FPA submits (and which the transcript evidences) with myriad interruptions from the member and his representatives.

For these reasons we do not consider the costs order unreasonable and we confirm the Panel’s determination.

V. FINAL STATEMENT OF APPEAL DETERMINATIONS

The Appeal Panel determines that in relation to the breaches appealed against:

Charge 1 - that the FPA made out its case to the appropriate standard of proof on the balance of probabilities, that the allegations of breach of Rule 101 were proved and that the grounds of appeal and review against the Panel's findings are not upheld;

Charge 2 - that the FPA made out its case to the appropriate standard of proof on the balance of probabilities, that the allegations of breach of Rule 110 were proved and that the grounds of appeal and review against the Panel's findings are not upheld;

Charge 3 - that the FPA made out its case to the appropriate standard of proof on the balance of probabilities, that the allegations of breach of Rule 110 were proved and that the grounds of appeal and review against the Panel's findings are not upheld;

Charge 7 - that the FPA made out its case to the appropriate standard of proof on the balance of probabilities, that the allegations of breach of Ethic No 6 were proved and that the grounds of appeal and review against the Panel's findings are not upheld save that the grounds relating to conflicts of interest and excessive fees not being particularized in the breach notice are upheld;

Further the Appeal Panel determines that in relation to the order that the member pay the FPA's costs the Panel's determination was reasonable (indeed the member agreed to an element of it) and the grounds of appeal and review against the Panel's order for costs are not upheld.