FINANCIAL PLANNING ASSOCIATION OF AUSTRALIA

CONDUCT REVIEW COMMISSION

DETERMINATION
AND REASONS FOR DECISION

CRC 2014_1

PANEL MEMBERS: **PROFESSOR DIMITY KINGSFORD SMITH, CHAIR**
MRS SANDRA BOWLEY
MR JAMES COTIS

MEMBER: **MR ROBERT (BOB) JONES**

DATE OF HEARING: **19 APRIL 2013**

DATE OF DETERMINATION: **19 SEPTEMBER 2014**

REPRESENTATIVES: MR MARK MURPHY

(MR JONES DID NOT ATTEND OR APPEAR)

DETERMINATION
AND REASONS FOR DECISION

I. SUMMARY OF DETERMINATION AND REASONS

The Conduct Review Commission finds breaches of FPA Rules of Professional Conduct by Jones being Rule 108 that Jones failed to collect sufficient information to ensure appropriate advice could be given. Also Rule 110 that Jones failed to develop a suitable financial strategy or plan for the client. Further, that Jones failed to ensure his conduct did not bring discredit to the financial planning profession and breached Ethic 6. Finally he also breached Rule 127 that a member must cooperate with the FPA in all investigations. The CRC concluded the determination with sanctions that include expulsion from the FPA and fines.

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 Investigation Officer, as a result of a complaint received by the FPA from a client of Robert (Bob) Jones (Jones), a member of the FPA. The complainants, Mr and Mrs M, complained that they received inappropriate financial advice which was not suited to their needs and was not based on sufficient information about their personal circumstances and risk preferences. Jones was at that time an authorised representative of Storm Financial Pty Ltd (Storm), an Australian Financial Services Licensee.

2.2 After investigation and correspondence between the FPA and Jones it was alleged that Jones 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:

1. In breach of FPA Ethics and Rules 108 Jones failed to collect sufficient information to ensure that in making oral or written recommendations to clients he gave appropriate advice.

Particulars: Jones failed to collect any information about the risk tolerance or preferences of Mr and Mrs M. At meetings with Mr and Mrs M on or about 24 May 2006 and on other occasions when they met and through correspondence Jones collected no information about Mr and Mrs M's attitude to financial risk, nor did he complete a financial risk scenario analysis with Mr and Mrs M.

2. In breach of FPA Ethics and Rules 110 Jones provided an unsuitable financial strategy or plan for Mr and Mrs M.

Particulars:

(a) At a meeting on or about 24 May 2006 Mr and Mrs M told Jones they had the investment purposes set out in paragraphs below. These investment purposes were reduced to writing by Jones in the document 'Confidential Financial Statement' signed by Mr and Mrs M on 24 May 2006:

(i) Mr M to retire at 65 years (July 2010), and to reduce working hours in the year before and Mrs M to retire at the same time or before;
(ii) both to be self-funded retirees;
(iii) have overseas holidays and go to shows and events;
(iv) purchase a new car on retirement; and
(v) cover living expenses of approximately $30,000 per year.

(b) At the meeting on or about 24 May 2006 Mr and Mrs M chose a level of risk in completing the Confidential Financial Profile that stated:

'*I am prepared to accept volatility if in the medium to long term the investment growth is higher and the risks over that term are minimal or eliminated*'.

In disregard of this instruction, Jones advised Mr and Mrs M to adopt a strategy and particular transactions that were far riskier than the instruction of 24 May 2006.

(c) By a SoA dated 14 August 2006 Jones recommended that Mr and Mrs M, who were both approaching retirement:

(i) take out an equity loan of $256,000 (in fact $212,000 was borrowed) with ANZ Bank, secured on their unencumbered residence then valued at $320,000;
(ii) take out a margin loan of $200,000 (in fact $180,000 was borrowed) with Macquarie Bank;
(iii) invest $272,000 in Storm Badged Index Funds (industrial index);
(iv) invest $108,000 in Storm Badged Index Funds (resources index);
(v) invest $20,000 in Storm Badged Index Funds (technology index); and
(vi) pay $32,609 in upfront fees.

(d) The recommendations were unsuitable because the strategy recommended in the Statement of Advice of 14 August 2006 required Mr and Mrs M to:

(i) continue to contribute cash of their own of $14,400 per annum for the duration of the plan (well past desired retirement date in July 2010) as demonstrated by the cash flow analysis dated 16 August 2006 and the revised cash flow analysis dated 8 November 2006;

(ii) continue to pay all their own living expenses from their own earnings (approximately $23,000 per annum) for the duration of the plan as demonstrated by the cash flow analysis of 16 August 2006 and the revised cash flow analysis of 8 November 2006;

(iii) the cash reserves in the plan were insufficient to cover the bank and margin loan payments as demonstrated by the cash flow analysis dated 16 August 2006 and the revised cash flow analysis dated 8 November 2006;

(iv) meet bank and margin loan payments from either further borrowings (which may not be available) or the realisation in cash of accumulated investment growth (which may not be possible) neither of which was explained to Mr and Mrs M;

(v) the cash flow analysis dated 16 August 2006 and the revised cash flow analysis dated 8 November 2006 each demonstrates that the entire strategy was unsustainable and totally unsuitable for a couple approaching retirement; and

(vi) in addition to the amounts borrowed under the initial SoA dated 14 August 2006, by Statements of Additional Advice (SoAA) Jones recommended Mr and Mrs M take on additional margin loan and home equity debt as set out in the following table and make further acquisitions of interests in index funds with those funds:

Lender	**Date of SOAA**	**Loan Amount**
Macquarie Bank	08/03/2007	$53,254
Macquarie Bank	17/08/2007	$50,412
ANZ Bank	12/06/2008	$100,000
TOTAL BORROWINGS ON SOAAs		$203,666
Original borrowing from ANZ	14/08/2006	$212,000
Original borrowing from Macquarie Bank	14/08/2006	$180,000
TOTAL BORROWINGS		$595,666

There were various withdrawals and repayments of the loans that are not referred to in SoAAs so that at the time of their last borrowing in June 2008 Mr and Mrs M owed the Macquarie Bank $321,408 and ANZ Bank $356,000, a total indebtedness of $677,408. This level of debt was unsuitable because it meant that even a relatively common drop in the value of the index funds (let alone the drop that did occur in September/October 2008), would wipe out the value of Mr and Mrs M's cash contributions and home equity which as a couple approaching retirement, they had no hope of replacing.

(e) By a further SoAA dated 10 October 2008 Jones advised Mr and Mrs M to pay $60,000 of their own funds, being proceeds of superannuation, into the strategy.

(f) Mr and Mrs M still have their home valued at $320,000 but it is encumbered by two mortgages totalling $311,000.

3. In breach FPA Ethics and Rules 6 Jones failed to ensure that his conduct did not bring discredit to the financial planning profession.

Grounds and Particulars:

(i) The FPA repeats as particulars all the breaches and particulars set out in paragraphs 1 and 2 above.

4. In breach of FPA Ethics and Rules 127 Jones failed to co-operate with the FPA in all aspects of any investigation or compliance review.

Particulars:

(i) Jones failed to assist the FPA's Investigation Officer, Mr Daniel Ezzy, who was an appointed person for the purposes of this rule. Jones failed to assist an investigation by not responding to letters from Mr Ezzy dated 23 November 2009, and emails dated 18 January 2010, 9 February 2010, 15 February 2010 and 16 February 2010. Also, further letter of 7 May 2010;

(ii) telephone call on 15 February 2010 to Mr Ezzy from Mr Reg Tierney, the compliance officer at Jones new licensee Infocus Securities, stating that Jones will not be responding to the FPA's inquiries about Mr and Mrs M's complaints as he does not consider himself to be a current FPA member; and

(iii) in fact Jones remains a member of the FPA under the Constitution and Disciplinary Regulations.

III. BACKGROUND TO THE COMPLAINT

3.1 Jones is a member of the FPA. Jones was an authorised representative of Storm Financial from 22 September 2003 to 16 June 2009. Since then, Jones has been an authorised representative of another licensee. In 2009, Storm went into voluntary administration and liquidation.

3.2 Prior to engaging with Storm, Mr and Mrs M had only received financial advice about AMP superannuation. Their investment experience was otherwise limited to the purchase of a residential home and an AMP managed fund valued at $25,000.

3.3 Mr and Mrs M were referred to Jones by Mr M's former work colleague. They met with Jones for a '*Primer Appt*' on or about 11 April 2006 and attended the Storm Financial Education Workshop on or about 31 May 2006. They later met with Jones for a further '*Info Gathering Appt*' on or about 24 May 2006 and completed a Confidential Financial Profile (Exhibit 6).

3.4 At the time, Mr and Mrs M, aged 60 and 57 years of age, had no financial dependents. In completing the Confidential Financial Profile, they explained that their financial circumstances were as follows:

Asset	**Asset Value**	**Liabilities**
Family Home	$320,000	
2 x Motor Vehicles	$10,000	
Financial Assets		
Superannuation Assets	$156,000	
AMP Future Directions Fund	$25,000	
Cash in the bank	$11,000	
Total	**$522,000**	**$0**

3.5 The Confidential Financial Profile also identified Mr and Mrs M's needs and wants. Briefly, this included reducing Mr M's working hours, maintaining living standards, overseas and domestic trips, musicals, and grandchildren. Mr M's intention to reduce his working hours was to work towards retirement at age 65 (July 2010), with Mrs M also retiring at the same time.

3.6 Mr and Mrs M stated that no formal risk questionnaire, scenario analysis or question and answers were completed by Jones regarding Mr and Mrs M's risk characteristics. In the Personal Profile section on page 22 of the Confidential Financial Profile Mr and Mrs M selected:

> *"I am prepared to accept volatility in the mid to long term to achieve investment growth provided risks over that term are minimised or eliminated*"

3.7 On or about 14 August 2006, Jones issued Mr and Mrs M with their first Storm SoA (Exhibit 7). The SoA provided the following borrowing recommendations (page 52):

(i) borrow $256,000 in an equity loan (ANZ Bank) against their home; and
(ii) borrow a further $200,000 by margin loan (Macquarie Bank Margin Lending).

The SoA made the following investment recommendations (page 52):

(i) invest $20,000 into the Storm Australian Technology Indexed Trust;
(ii) invest $272,000 into the Storm Australian Industrials Indexed Trust;
(iii) invest $108,000 into the Storm Australian Resources Indexed Trust; and
(iv) hold surplus funds of approximately $20,000 in the Macquarie Investment Management Cash Management Trust.

The upfront fee payable for implementation of this plan was $32,609 (page 53).

Annexure B of the SoA outlines financial modelling completed and presented by Jones, and assumes Mr and Mrs M will:

(a) inject $12,000 in the first year and inject a perpetual cash flow of $14,400 per annum thereafter; and

(b) finance their lifestyle expenditures with other means indefinitely. Jones did not indicate how Mr and Mrs M would fund their objectives while reducing work hours, working towards retirement and after retirement from July 2010.

Mr and Mrs M did not proceed with the initial loan levels recommended and instead borrowed $212,000 against their home and a $180,000 margin loan. A new cash flow diagram (Exhibit 8) was issued on or about 8 November 2006 to reflect this.

3.8 On or about 8 March 2007, Jones issued Mr and Mrs M with a Statement of Additional Advice (SoAA) (Exhibit 9). This was an extension of their pre-existing double gearing strategy, and was later adopted by Mr and Mrs M. This included:

(i) redeeming $5,000 from their Storm Australian Industrials Indexed Trust and depositing these funds in their Cash Management Trust account;
(ii) borrow a further $53,254 from the margin loan facility;
(iii) invest $50,000 of this in Storm Australian Industrials Indexed Trust; and
(iv) pay $3,254 in fees to Storm.

3.9 Jones provided Mr and Mrs M with a further SoAA dated 17 August 2007 (Exhibit 10), in which Jones made further recommendations later adopted by the complainants, including borrowing a further $50,412 from the margin loan facility for investment in Storm Indexed Trusts and for payment of fees to Storm. At this point the margin loan outstanding totalled $304,037.02.

Between 3 September 2007 and 26 November 2007, Mr and Mrs M made five redemptions totalling $37,000 (Exhibit 11).

3.10 Mr and Mrs M had their home re-valued and discovered that it had increased in value. In an additional SoAA dated 12 June 2008 (Exhibit 12), Jones made recommendations including borrowing an additional $100,000 from their home equity loan with ANZ. Consequently, the total home loan increased to $356,000. This amount went to paying a portion towards the variable part of their margin loan, further investments, fees to Storm and deposits in their Cash Management Trust. They also borrowed $27,321 from their margin loan account to pre-pay interest on their margin loan for the forthcoming year. The margin loan account then totalled $321,408.

At this point, Annexure B of the SoAA shows that the strategy assumed an annual perpetual injection by the complainants of $15,600 from July 2009, and still required Mr and Mrs M to fund their own living expenses.

3.11 Mr and Mrs M later received a letter dated 8 October 2008 (Exhibit 13) from Storm Financial. This recommended that they switch up to 50% of their portfolio from equities to cash. Following discussions with Jones, Mr and Mrs M switched 100% of their portfolio to cash.

3.12 In discussions prior to 10 October 2008, Mr M indicated that Jones told him, in general terms, that his existing AMP Superannuation fund was not the right one for him and that he could get better returns investing his superannuation amounts in the Storm strategy already recommended by Jones. Jones subsequently issued Mr and Mrs M with a further SoAA dated 10 October 2008 (Exhibit 14). This recommended investing $60,000, the proceeds of Mr M's modest AMP superannuation, into the Storm Australian Industrials Indexed trusts, paying Storm $4,327 in fees, and quarantining $20,000 for a pending outlay. These recommendations were subsequently adopted.

3.13 Mr and Mrs M's portfolio underwent margin call on 11 October 2008. Mr M only ascertained this from Macquarie Bank in February 2009 (Exhibit 15). Their position was subsequently closed out, after which they were left with a mortgage of about $300,000 on a home unencumbered prior to accepting Jones' recommendations, no investment assets, and Mr M with no superannuation. Mr and Mrs M are both now retired and reliant upon Centrelink benefits.

3.14 In summary, the complainants had a retirement asset base (minus their home and motor vehicles) of $192,000 when they implemented the advice received from Jones. At the time of their last borrowing in June 2008 Mr and Mrs M owed Macquarie Bank $321,408, and ANZ Bank $312,000.

IV. THE FPA'S POSITION

FPA Ethics & Rules 108 – The Failure to Collect Sufficient Information Allegation

4.1 The FPA alleges that in breach of the FPA Ethics and Rules 108, Jones did not collect any information about the risk tolerance or risk preferences of Mr and Mrs M. During the meetings with Mr and Mrs M on or about 24 May 2006, and on other subsequent occasions when they met Jones and through correspondence, the FPA contends Jones did not collect information about Mr and Mrs M attitude to financial risk. Nor did Jones complete a financial risk scenario analysis or ask any specific questions of Mr and Mrs M. This was not done with subsequent SoAAs either. This is despite Jones allegedly recommending additional investments of a high risk nature involving further borrowings and increasing Mr and Mrs M exposure to risk.

4.2 The FPA believes that Mr and Mrs M conservative risk tolerance was demonstrated by the option selected in their Confidential Financial Profile: *'I am prepared to accept volatility in the mid to long term to achieve investment growth provided risks over that term are minimised or eliminated*'. There were other indications of Mr and Mrs M conservative tolerance to risk and concern for preservation of their capital. This included their desire to maintain living standards, to live self-sufficiently and for Mr M to reduce working hours from 2007. A subsequent insight into Mr and Mrs M conservative tolerance to risk is their concern for capital preservation, which the FPA believes is shown by their decision to borrow lesser amounts than recommended by Jones (shown in work-papers dated 8 November 2006).

4.3 The FPA contends that Jones did not appear to undertake any further independent inquiry of Mr and Mrs M conservative risk tolerance and thus failed to ensure sufficient information was collected on Mr and Mrs M willingness and ability to take risk. The FPA asserts the lack of inquiries made by Jones meant he failed his obligation to ensure the high risk gearing strategy he recommended was appropriate.

FPA Ethics and Rules 110 – The Failure to Provide a Suitable Financial Strategy Allegation

4.4 The FPA alleges that in breach of the FPA Ethics and Rules 110, Jones failed to develop any suitable financial strategy or plan for Mr and Mrs M before making his recommendation that they invest and make loans. Jones had recommended to Mr and Mrs M, who were approaching retirement, a high risk and unsustainable strategy which used a significant amount of debt to make purchases of undiversified and volatile assets.

4.5 The FPA asserts that Mr and Mrs M had chosen a level of risk for their financial plan that was not matched by the advice they were given. In the Confidential Client Profile, Mr and Mrs M agreed to accept a conservative level of risk. The FPA argues that through a lack of proper research and analysis, Jones advised Mr and Mrs M to adopt a strategy and particular transactions that were far riskier than what was appropriate for them as evidenced in the SoA dated 14 August 2006. The FPA further argued Jones failed to develop any suitable financial strategy or plan for Mr and Mrs M before making the recommendation that Mr and Mrs M adopt a geared investment strategy. This involved large margined borrowings and large borrowings secured on their unencumbered residence, along with increasing the concentration of Mr and Mrs M's undiversified investments (Storm Badged Index Funds).

4.6 The FPA also asserts it would seem unlikely Mr and Mrs M would have had sufficient capital to inject into the strategy, particularly after retirement where they had hoped to be self-funded retirees. The risk of losing the capital of the borrowed funds and assets on which it was secured meant it was difficult for Mr and Mrs M to replace that capital as they transitioned to retirement. This is particularly so where the risk level of the strategy was much higher than the conservative level Mr and Mrs M had chosen. In particular, the FPA submitted in evidence the SoA had recommended that Mr and Mrs M contribute cash of $14,400 per annum until 2023.

4.7 Mr and Mrs M cash flow would have been insufficient to fund this strategy given they desired to retire in July 2010 and would have been unable to make ongoing contributions. In addition, Mr and Mrs M were required to pay all of their own living expenses from their own earnings under the strategy recommended by Jones, regardless of the fact they would cease to have earning capacity upon retirement and had only a modest balance in superannuation. Further, the strategy required Mr and Mrs M to meet loan repayments from either further borrowings or the realisation of accumulated investment growth, both of which the FPA believes may not have been available.

4.8 The FPA alleges that Jones' recommendations to Mr and Mrs M in the four SoAAs are an extension of his initial strategy and are further failures on his part to develop a suitable financial strategy for Mr and Mrs M. In the SoAAs, Jones recommended Mr and Mrs M take on additional margin lending and home equity debt. This was to make further acquisitions of interests in index funds. The FPA contends that Jones did not make any attempt to collect more detailed information from Mr and Mrs M about their tolerance to risk for the purpose of any of the series of SoAAs.

4.9 The FPA alleges that Jones failed to ensure that these additional recommendations were suitable for Mr and Mrs M, as it was not adequate for Jones to merely rely on previous information collected. The FPA submits there is no further evidence suggesting an adequate reassessment of the suitability of his strategy. The FPA asserts there should have been some consideration given to the suitability of taking on further borrowings, particularly given Mr and Mrs M concern for capital preservation as they had chosen to borrow fewer funds than had been initially recommended by Jones. Accordingly, the FPA asserts that taking out further loans was an unsuitable strategy recommended to Mr and Mrs M in the subsequent SoAAs given the level of gearing recommended. This is because even a relatively common drop in the value of the index funds would have wiped out the value of Mr and Mrs M cash contributions and home equity. Mr and Mrs M would not have been able to replace such losses on their investments as they were approaching retirement.

4.10 The FPA contends that Mr and Mrs M position is exacerbated by recommendations to extract further equity in the SoAA dated 12 June 2008. The same applies to the recommendation to use the proceeds from superannuation of $60,000 in the SoAA dated 10 October 2008. These recommendations significantly increased the risks by increasing the loan to valuation ratios, escalating from 47% in August 2006 to 75% in October 2008. The FPA argues the recommendations were unsuitable given the high level of risk in the event of a market downturn. The strategy recommended by Jones both increased borrowings and reduced diversification by increasing their concentration in the undiversified Storm Index Funds investment.

4.11 The FPA believes Mr and Mrs M relied upon and trusted Jones to recommend a conservative strategy, yet Jones recommended a strategy and various extensions of the strategy placed them in a high risk position. The FPA alleges that Jones' strategy, and extensions of his strategy, had grave consequences for Mr and Mrs M financial well-being by placing the value of the capital at considerable risk. As at February 2012, Mr and Mrs M previously unencumbered residence (valued at about $350,000), was encumbered by a mortgage to the value of about $256,000. In making each recommendation, the FPA asserts that Jones made unsuitable recommendations to Mr and Mrs M based on their tolerance to risk, and their circumstances and objectives.

FPA Ethics and Rules 6 – Bringing Discredit to the Financial Planning Profession

4.12 The FPA argues that as a result of the conduct alleged in the paragraphs above, Jones has brought the profession of financial planning into discredit.

FPA Ethics and Rules 127 – The Failure to Co-operate with the FPA Allegation

4.13 The FPA believes Jones has failed to assist the FPA in the conduct of this investigation. Jones has not responded to the majority of the FPA's letters and emails in response to the complaint. Jones attempted to resign his FPA membership in 2009. According to Clause 14.8 of the Constitution (effective 1 July 2008), Jones remains a member of the FPA while an investigation is conducted against him.

V. THE MEMBER'S POSITION

5.1 As has already been stated, Jones neither attended nor appeared at the hearing. Jones also chose not to respond to the Breach Notice of 17 September 2013. Jones was provided repeated opportunities to respond to the breaches alleged against him, and chose not to respond. Jones was provided notice of the hearing date, and chose not to respond or attend. Correspondence, mostly by email with Jones and with the compliance officers at Infocus, for whom Jones is now an authorised representative, confirmed that Jones would not be attending.

The first substantial intervention in the matter by Jones occurred by letter of 28 July 2014. The letter was from Ferguson Cannon, the solicitors Jones retained to respond to the next to last draft of this determination, sent to him by the FPA. Through that letter Jones denies the allegations made against him on all counts. He gives no particulars of fact or law on which to base those denials.

The letter then makes some objections about the CRC's powers and procedures: that the CRC is acting *ultra vires*, that Jones has not been accorded natural justice and that there was no case to answer because the complainants did not themselves give evidence. The objections included that the imposition of fines against Jones would be void or unenforceable because they are in the nature of a penalty and that publication of the determination would be defamatory. Ferguson Cannon say they would '*seek our client's instructions to commence defamation proceedings against the FPA*' if the determination is published.

We have dealt with this series of objections at the last minute by adding to the next to last draft of the determination, extra discussion in Part VI dealing with these arguments.

VI. THE LEGAL QUESTIONS

Was Jones a Member of the FPA?

6.1 Jones, by a letter from his lawyers dated 28 July 2014, argued that at the time of the initiation of proceedings against him by the FPA he was not a member of the association. Like Jones, the FPA also had a chance to respond to the next to final determination of the CRC in this matter. In a letter dated 8 August 2014, the FPA pointed out that the FPA's investigation of Jones began prior to and was notified to him by their letter of 4 February 2009. On 13 February 2009 the FPA received a letter from Jones dated 7 February 2009, purporting to resign from his membership. The FPA replied on 4 May 2009 declining to accept Jones resignation, and citing clause 14 of the FPA Constitution. Clause 14 provides that the FPA cannot accept a member's resignation if an investigation has already been initiated.

6.2 FPA personnel visited the website of his authorising licensee Infocus, on 4 February 2011 and 19 April 2013 (the day of the CRC hearing of this matter). On both visits it was seen that Jones continued to hold himself out as holding the FPA's CFP designation of financial advisory education and competence.

6.3 Accordingly, as a matter of law we find that Jones remains an FPA member until the period for lodging an appeal against the sanctions set out below expires. Those sanctions, for the reasons also set out below, include expulsion. In the meantime, Jones has reaffirmed his FPA membership by attempting to resign by letter of 7 February 2009, and by using the FPA's CFP marks.

The Withdrawal of Mr and Mrs M as Complainants and the Substitution of the FPA; the FPA's Power to Bring Proceedings against Jones

6.4 A preliminary issue in this determination is whether the matter should have proceeded when the complainants, Mr and Mrs M withdrew. They withdrew at a late stage, having assisted the FPA Investigation Officers in the collection of documents, providing accounts of information and advice given by Jones at meetings and explanations of transactions undertaken on that advice. In essence the question is, has a complaint been properly constituted if the original complainants withdraw?

6.5 In the absence of sufficient evidence for the FPA to make out its case, it would not of course be appropriate for the FPA to continue with proceedings. A tribunal such as the CRC may continue proceedings without the complainants, if there is credible evidence on which it can conclude there is a case for the member to answer. This is the clear position in general law. A complainant in a disciplinary tribunal, though lodging a complaint, is eventually only a witness. If continuing is in the public interest, then a professional organisation such as the FPA may continue to pursue the regulatory interest in proceedings for that reason. In *Weaver v Law*

Society of NSW (1979) 142 CLR 201 at 207, it was made clear that disciplinary proceedings are in a category of their own, and do not require a plaintiff and a defendant as in other civil proceedings. The FPA in bringing proceedings is the advocate of the public interest in professional conduct amongst financial planners.

6.6 If this were not clear enough in the general law of tribunals, the FPA's own Disciplinary Regulations now provide that the FPA may bring proceedings on its own initiative against a member, in the absence of a complainant.

The disciplinary regulations adopted in 2007, as amended by the FPA Board in June 2010, provide at clause 2.2 that the FPA may initiate a complaint if it believes a member's conduct warrants an investigation. This is in addition to the usual course of members of the public making complaints.

6.7 Jones' membership of the FPA was subject to change in the various regulations and codes of the FPA. His membership is therefore subject to paragraph 2.2 of the FPA's Disciplinary Regulations which allows proceedings to be bought by the FPA without complainants. His membership is also subject to the general law principles that a professional body or industry organisation may bring proceedings against a member in its domestic tribunal, without a complainant, where it has sufficient evidence. For these reasons we conclude that these proceedings against Jones are properly constituted.

6.8 Jones, through his solicitor's letter of 28 July 2014, argues that '*the FPA is acting ultra vires and has taken on powers that as a company limited by guarantee it does not have*'. We agree with Ferguson Cannon that neither the FPA nor the CRC have '*statutory powers or authority to conduct investigations*' and so on. A concern with statutory powers misses the target. The powers in question are those of a company limited by guarantee under the contract of membership, particularly under its Disciplinary Regulations. That contract of membership Jones agreed to when he signed the membership application form, paid his initial subscription and annual renewals. It is under that contract, including the Disciplinary Regulations that the investigation and hearing processes have been carried on. It is true again that the CRC has no powers of compulsion of the type familiar in statutory tribunals. But it does have powers to ask Jones for documents and other information and Jones has obligations to reasonably cooperate with those requests, again, under the contract of membership (see further discussion of this below). That contract extends to the determination of the CRC being contractually binding upon Jones, including a power to impose sanctions.

6.9 It is that determination, and those sanctions, that the CRC sought Jones' final submission on in sending him the next to last draft of this determination. Those submissions (in the letter of 28 July 2014) included objections to the CRC's observance of procedural fairness. In particular the prohibition of legal representation

was raised, and the assertion made that '*officers of the FPA involved in the investigation and hearing of this matter were qualified lawyers*'. Again, it is well established in the general jurisprudence of procedural fairness, that the right to have legal representation is not necessarily a sign that natural justice has been denied. It all depends on the context. The context of this matter is a domestic tribunal with rules that prohibit a member being represented, without consent of the CRC. For a start, Jones showed no interest in having representation; indeed, his stance towards the CRC has been to ignore the proceedings. No application was made for legal representation, and no grounds for representation were presented.

Second, the assertion that the FPA's Investigation Officer is legally trained is not correct. The Investigation Officer does not hold a law degree. His expertise comes from long experience in financial services organisations, in conducting investigations. It was he who prepared and presented the FPA's case in the Jones matter to the panel, and there was no legally trained person before the CRC.

Accordingly, we conclude that on the law and the facts, the submissions by Jones that there have been unauthorised exercises of power by either the FPA or the CRC and departures from procedural fairness, are not accepted by us.

The Reliance on Documentary Evidence Not Complainants' Testimony

6.10 This legal point arises because the complainants, after providing the FPA's Investigation Officer with documents and a draft proof of evidence, withdrew from the proceedings. Jones is still practising as a financial adviser and the FPA decided to continue the proceedings in the public interest. It decided to rely on the evidence it had at the time the complainants withdrew to show that the member had a case to answer. This approach raises the question of what evidence the FPA can rely on, and whether the evidence it relied on is sufficiently relevant, probative and weighty to prove its case. There is also the related question of whether the absence of the complainants and the consequential inability of the panel to question them, diminishes the probative value and weight of their written evidence; their statement was unsigned at the time they withdrew and remains so.

(i) Sources and types of evidence the CRC can consider and weigh

Regulation 9.6 of the FPA's Disciplinary Regulations (2007 amended June 2010) provides that the CRC may '*inform itself on any matter in any manner it sees fit*'. What does this mean?

6.11 It is clear that a decision may be challenged as '*irrational*' if a tribunal acts '*without any evidence, or the decision is so flagrantly wrong that it shows it has not exercised its judicial function*' (*Ex parte Mansfield* (1899) 20 NSWLR 75 at 81-82) or where no sensible authority would make the decision in question (*Secty for*

Education and Science v Tameside Council [1977] AC 1014 at 1064). That is not the case here.

6.12 Australian courts respect the findings of fact and opinions of tribunals so long as there is a rational basis for their conclusions. Sufficiency of evidence is usually regarded as unreviewable, especially when the tribunal's regulations include a permission to inform themselves as they see fit, as the CRC's rules do. Accordingly, the CRC is able to accept, examine and weigh, and if appropriate exclude, all types of evidence that are relevant to the allegations against the member. In this case that includes the complainants' unsigned draft statement, documents received from them and from the liquidators of Storm, Korda Mentha, and from the complainants' bankers and other financial intermediaries.

(ii) Documents Received from Korda Mentha by the FPA

6.13 Once the complainants lodged their original complaint, the FPA's Investigation Officer applied to the liquidator of Storm for the file that Storm kept in relation to Mr and Mrs M. The relevant documents which the liquidator had in its possession were scanned onto a compact disk and sent to the FPA's Investigation Officer. This procedure was followed with virtually all of the complaints received by the FPA against Storm advisors. None of the parties, including the member, have raised any objection to the authenticity, contemporaneity or accuracy of content or signature of any of these documents.

(iii) Evidence from Mr and Mrs M in their Draft Statement of Facts

6.14 The draft statement of facts was mostly the work of Mr M who the FPA's Investigation Officer received it from. It was unsigned at the time Mr and Mrs M withdrew, though also virtually complete. It was relied upon by the FPA's Investigation Officer in making the FPA's case. This reliance was mostly to explain the order of events and some of the statements made in the documents which came from Korda Mentha. The documents have the effect of corroborating the statements made in the statement of facts. The panel has placed considerable reliance on material where the statement of facts is corroborated by the Korda Mentha documents. The CRC has avoided, where possible, making any finding of fact on the basis of the complainant's draft statement alone. Firstly, because although an advanced draft, it was a draft and it was unsigned. Secondly, because the absence of the complainants from the hearing meant that the panel was unable to test the statements of the complainants in questioning.

6.15 As the High court made clear in *News Corp v NCSC* (1984) 156 CLR 296, cross examination is not an essential element of natural justice; all depends on the context e.g. constitution of organisation, level of prejudice to defendant. As well as the steps already mentioned to offer Jones an opportunity to meet the allegations

against him, the CRC also accords the member an opportunity to make further submissions on the next-to-last draft of the panel's determination. This is to address any findings that have been made which may be corrected by information or argument from the member.

(iv) The authority of Daniel Jones and his signature on the last SoA. The SoAs were delivered under covering letters. Most of them bear the signature of Jones the member. Some of those covering letters have a signature line which reads:

'Bob Jones/Daniel Jones
Bob Jones Professional Planning Pty Ltd'

6.16 From 6 December 2004, according to the ASIC register, Bob Jones Professional Planning Pty Ltd was an Authorised Representative of Storm Financial Pty Ltd. Bob Jones the FPA member was the majority shareholder and a director and the secretary of Bob Jones Professional Planning Pty Ltd at all relevant times. Bob Jones, the member of the FPA, is also described as an authorised representative of Storm Financial in the signature line of letters to Mr and Mrs M.

6.17 The first SoA given to Mr and Mrs M and dated 14 August 2006 uses the sign off:

'Bob Jones/Daniel Jones
Bob Jones Professional Planning Pty Ltd'

in the covering letter. There is no signature of the member after this sign off line. On page 57 of the body of the SoA it is signed by the member and dated 18 September 2006, apparently authenticating a change to the description of assets held by Mr and Mrs M.

We think the combination of the authorised representative relationship between Storm and Bob Jones Professional Planning Pty Ltd and the majority shareholding and board control held by Bob Jones the member, means that there is a sufficient representation to conclude that the member authorised the advice to Mr and Mrs M. All the evidence on the documents and Mr and Mrs M's draft statement of facts corroborates that conclusion. This state of authority has never been denied by the member.

6.18 The company ceased being an authorised representative of Storm on 26 April 2007. After April 2007 Jones is described as an employee representative of Storm in the signature line of covering letters. The last SoA given to Mr and Mrs M on 10 October 2008 was with a covering letter which contains a signature line which describes the member as an employee representative of Storm. The letter is however apparently signed by Daniel Jones, designating himself as authorised to

sign on behalf of Bob Jones by the use of '*per*' before the signature. '*Per*' is short for '*Per procurationem*' or '*by proxy*'. We conclude from the signature line used in covering letters that Daniel Jones had worked in the member's business when the company was the authorised representative. Familiar with the routines, he was either given authority or held out as having authority to sign Mr and Mrs M's letter when Bob Jones was Storm's employee representative. The member has never denied this.

Legal Points Relating to Imposition of Sanctions: Penalties and Defamation.

6.19 *Penalties:* Through his solicitor's letter of 28 July 2014, Jones asserted that the fines and costs the CRC was minded to impose were '*clearly penalties and could not be enforced by the FPA*'. The letter cited the recent High Court case of *Andrews v Australia and New Zealand Banking Group Ltd* [2012] HCA 30 as authority for this proposition. In a nut-shell that case held that:

'*a stipulation prima facie imposes a penalty on a party (the first party) if, as a matter of substance, it is collateral (or accessory) to a primary stipulation in favour of a second party and this collateral stipulation, upon the failure of the primary stipulation, imposes upon the first party an additional detriment, the stipulation is described as being in the nature of a security for and in terrorem of the satisfaction of the primary stipulation*' (at p10).

6.20 This holding widened the apparent scope of relief against penalties (it is no longer necessary for there to be a breach of contract to trigger the penalty clause) and cast the entire principle into the arena of equitable doctrine, when it has been authoritatively established as part of the modern law of contract, for almost exactly a century (*Dunlop Pneumatic Tyre co Ltd v New Garage and Motor Co Ltd* [1915] AC 79). This authority has been accepted by the highest Australian courts (*Ringrow Pty Ltd v BP Australia Pty Ltd* [2005] HCA 71 esp at 21*; AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170 esp at 184) on the basis that the penalties doctrine gives effect to a rule of public policy, not the doctrines of equity. The concern of that policy in contract law (in both Australia until *Andrews* and in the UK still) is to preserve the compensation principle of contract damages, so that it provides a genuine quantum of restoration, not a punitive pre-estimate. Accordingly, in *Ringrow* the High Court said:

'*the law of penalties, in its standard application, is attracted where a contract stipulates that on breach the contract-breaker will pay an agreed sum which exceeds what can be regarded as a genuine pre-estimate of the damages likely to be caused by the breach*' (at 21).

6.21 It is in this light that the decision in *Andrews v Australia and New Zealand Banking Group Ltd* should be viewed. It has been trenchantly criticised (e.g. Carter et al 'Contractual Penalties: Resurrecting the Equitable Jurisdiction' (2013) 30 *J of Contract Law* 99-132), lower courts seem to have ignored it (*Love v O'Brien* [2012] WASC 457; *Sun North Investments Pty Ltd v Dale* [2013] QSC 44; *Cedar Meats Pty Ltd v Five Star Lamb Pty Ltd* [2013]VSC 164) it is already under appeal once more from *Paciocco v Australia and New Zealand Banking Group Limited* [2014] FCA 35 and may well not survive.

6.22 Turning now to the facts of Jones' objection; there are conspicuous differences between *Andrews* and the contract of Jones' membership of the FPA. That contract is a regulatory contract, a contract with a purpose of regulating conduct, not an exchange contract of the sort in contemplation in the penalties cases, including *Andrews*. It is clear that there are good reasons of public policy for excluding some types of contract from the law of penalties regardless of how it is formulated; if not insurance and indemnity contracts would be void or unenforceable, and there are other examples. We think that there are good public policy reasons for concluding that regulatory contracts of the sort under consideration here are outside the purview of contractual penalties law.

6.23 Next, there is no aspect of that contract which involved Jones and the FPA agreeing a pre-estimate of damages, genuine or not. This is because there is no aspect of the contract of membership which contemplates that breach would lead to calculation of damages; the breach of the membership contract leads to disciplinary sanctions, not compensation. It is often said that the presence of a penalty is finally indicated by the construction of the contract in question. Construction of this contract of membership, in the light of its terms and purposes, leaves no doubt that it is not one which contemplates traditional contractual damages.

6.24 As we have said, there was no pre-estimate, and an additional reason for that is the obligation on Jones to pay fines, does not arise until they are imposed by the CRC panel in its final determination. Those fines are in no sense a pre-estimate of anything. They are a carefully considered, deeply contextual and fact based analysis of what sanction should be imposed in line with the appropriate sanctioning principles as set out later in this opinion. They are conceived and imposed after the liability question has been decided and after submissions on sanction (if any) have been received, reflected upon and worked into the final reasons for decision. The determination as to costs is likewise formulated at the end of the proceedings (when the actual costs are known) and are a mere reimbursement of the direct variable costs of the FPA in holding the actual hearing of the matter. They are a reimbursement of out of pockets, and in no sense damages for loss. Accordingly, for these reasons we reject Jones' submission that '*the fines and costs are clearly penalties that could not be enforced by the FPA*'.

6.25 *Defamation*: Jones argues that the determination contains '*inaccurate and baseless defamatory statements*' and that publication is '*likely to cause significant injury to out client's professional reputation*'. We would like to point out two matters: one legal and the other factual, which leads us to reject this objection to sanctions by Jones as well.

6.26 The Defamation Act 2005 (Qld) at section 29(1) provides for privilege in relation to defamatory statements, where they are made honestly and as a fair report of proceedings of public concern. In particular section 29 (4) (j) (i) and (ii) provide that '*proceedings of public concern*' include:

(j) '*proceedings of a trade association, or of a committee or governing body of the association, under its relevant objects, but only to the extent that the proceedings relate to a decision or adjudication made in Australia about –*

(i) a member or members of the association; or

(ii) *a person subject by contract or otherwise by law to control by the association*'.

There are statutes that are substantially identical in other Australian States and Territories. It is our opinion that the FPA comes within the definition of '*a trade association*' and that any decision it makes to publish the determinations of the CRC are privileged in this way. Jones has not asserted that the determination is not going to be published honestly for the information of the public or the advancement of education as required by section 29. Accordingly we conclude that defamation is no obstacle to the publication of this determination and reasons.

6.27 Our second and factual point is this: Jones has not specified at all the '*inaccurate and baseless defamatory statements*' he says are within the next to final draft determination. Not one single objection is made in sufficient detail to evidence this otherwise vacant assertion. Therefore we conclude that there are no grounds on which Jones could assert that the FPA's publication of this determination is not honestly for the information of the public; that is, warning them that Jones is an unprofessional financial advisor who has departed from the standards of conduct fitting for a FPA member. On this basis too, we conclude that defamation is no barrier to publication by the FPA of this determination under the defence in section 29 of the Defamation Act 2005 (Qld).

Information seeking

6.28 Rule 108 of the FPA Ethics and Rules requires an adviser to '*collect sufficient information to ensure appropriate advice can be given*'. Clearly the main thrust of this requirement is in relation to giving initial advice. The wording of the rule is wide enough, and common sense understanding of financial advising practice suggests, it would also apply to additional or supplementary advice. Rule 108 applies the

obligation whenever a member is '*preparing oral or written recommendations to clients*'.

6.29 Clearly too it is reasonable to adjust what it takes to discharge this rule to the circumstances. An adviser will have to do much more where a client's affairs are complex than if they are simple. If a client is particularly vulnerable (e.g. their need for advice is for investing a damages award after catastrophic injury) more extensive and diligent enquiries and information collection will be required than, say, for a twenty-something just starting in the workforce with no significant assets or liabilities. Likewise, where an extensive investigation of the affairs of a new client has been done recently, this rule will *usually* be discharged by relatively limited further enquiries. However, Rule 108 cannot be discharged by no enquires at all.

6.30 To discharge Rule 108 in giving supplementary or additional advice, the member has to enquire at least enough to be certain that the client's objectives, financial situation and needs are not significantly altered from the previous investigation. Further, previously gathered information can only be relied on where the additional advice does not change already implemented financial recommendations. Again, prior information can only be relied on where new recommendations do not proceed on a basis different to the advice previously given. The only way a member can know about these matters, is to make an irreducible minimum of enquiries of the client.

6.31 In the same vein, it does not discharge Rule 108 to impose (in writing or otherwise) an obligation on the client to tell the adviser if circumstances have changed. Of course it is good practise to alert a client to the need to keep an adviser up to date. But that does not excuse an adviser from making enquires commensurate with the circumstances before giving advice, additional or otherwise. Some clients will not understand what kinds of information a member needs to make suitable recommendations; they will not appreciate that their circumstances have changed. It is up to the member to make the enquiries; this is demanded by the text of Rule 108 and it is necessary to discharge an adviser's suitability obligation. It is also required to be able to act professionally.

6.32 A central aspect of information seeking is to identify the risk preferences of the client. Particular care is required in this area because client risk preference is not always easy to identify, and because the client needs to agree to the risk level inherent in the recommendations the advisor makes. Identifying the level of risk a client prefers is a mix of client circumstances, personal and financial, expectations and goals and the reality of achieving them and the personality traits of the client. The client needs not only to agree, but that agreement must be fully informed consent – the FPA rules go further and require that the advice given is presented in a fashion that the client is likely to understand. So information seeking by the advisor and discussion with the client must be thorough and careful so the consequences of

decisions on risk are understood on both sides and implemented as both sides expect.

6.33 To address the difficulties of risk identification and to navigate the path to thoroughgoing agreement, a number of risk profiling or assessment tools have been developed. One of the researched benefits of these tools is that they assist in identifying risk preference in a more consistent and objective fashion. If risk is identified, even by the experienced planner, by the relatively intuitive means of unaided adviser judgment, it may be skewed by the personality traits of the adviser themselves. No-one is arguing that professional judgment is not a part of risk assessment; that is an important aspect of what financial advice is about. A risk profiling instrument does however assist with resisting the influence of over risky adviser assessments, and with consistency of approach to the identification of client risk preference. It is standard practice to use such risk profiling instruments for comprehensiveness of analysis, consistency of application and to avoid adviser bias in favour of risk that the client may not share. It may indicate failure to observe appropriate professional standards, or even negligence, not to use a risk profiling instrument.

Suitability

6.34 The material words of the 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 the FPA Ethics and Rules 108, discussed above. 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. This strategy may be to do nothing; or it may be to go home and pay off the mortgage and continue to make the highest contributions to an existing super fund that are affordable.

6.35 The identification of a suitable financial product 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.

6.36 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. It seems that while Jones was instructed by Mr and Mrs M to take a conservative to balanced approach to risk, instead all of their investment was

eventually directed to the share market, and they were also advised to borrow both against their home and under a margin loan. This would not satisfy the suitability obligation.

6.37 The role of the financial adviser is to discern the client's needs and put them into financial terms. Those needs include the need 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 adverse clients than for those who are perhaps younger or for many other reasons may tolerate higher risk. It is not acceptable for the planner to either ignore the risk preferences of the client or to persuade 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.

6.38 Continuing on, it is also unacceptable to simply assume that an investment additional or supplemental to an existing SoA will be suitable with out further inquiry or consideration. This too, is matching the client to the product, not the product to the client. As with information gathering under Rule 108, there will have to be an irreducible minimum of consideration given to the suitability of the additional investment. In some cases where a thorough investigation and suitability assessment has been made recently, it may take less analysis to decide that an additional investment, made on the same general basis as the recent SoA, is suitable. This would likely be the case, if for example the new investment increased diversification, or involved a conversion from a more risky to a less risky investment of a similar type.

6.39 Where however, what is being recommended increases the risk significantly, by reducing diversification, increasing borrowings or loan to valuation ratios, then there is a clear need for a thorough suitability reassessment. Where the client has clearly said they do not want to increase borrowings, and increasing them is the basis of the recommendations, then it is virtually inconceivable that such recommendations could be suitable. This is even if those additional borrowings were contemplated in a recent original SoA.

6.40 Finally on the question of suitability, it is not to the point for a planner to say that he or she has made disclaimers, or obtained concessions or made disclosure which exempts them from the operation of the suitability obligation. The best view of the effect of exemptions, disclaimers and disclosures on the suitability obligation, is that they are virtually useless in reducing planner liability. Similarly, using contract terms to position the client so their behaviour may be seen as akin to contributory negligence is also ineffective. We see no reason in principle and no compulsion or encouragement from the actual words of the FPA Ethics and Rules, to deviate from this position.

Professionalism

6.41 FPA Ethic 6 uses the word '*discredit*' which the Macquarie Dictionary says means to '*injure reputation or esteem*' or '*to destroy confidence in*'. There is overlap with the word '*disrepute*'. In a prior determination, after much discussion, the CRC concluded that for an FPA member's conduct to discredit the profession of financial planning, a member's conduct would require some '*moral deficiency*' or be '*grossly inappropriate*'. We adopt this meaning for this determination as well.

Cooperation

6.42 The FPA, having a voluntary membership of those desiring to be regarded as a profession, relies on cooperation of its members in all matters. In particular, the CRC has no powers of compulsion in relation to persons or evidence, and so is particularly dependant on its members' cooperation, in establishing the compliance (or not) with its Ethics and Rules.

VII. OUTCOME AND REASONS

In breach of FPA Ethics and Rules 108 Jones failed to collect sufficient information to ensure that in making oral or written recommendations to clients he gave appropriate advice

(i) Facts collected and deficiencies as basis for a suitable financial plan:

7.1 In one of their early visits to Storm Financial, Mr and Mrs M, with the assistance of Jones, completed the Storm Financial Confidential Financial Profile. This was likely on 24 May 2006. The figures inserted about Mr and Mrs M's income and expenses (and hence the disposable income they had to put towards the recommended strategy) are incomplete, crossed out and virtually unintelligible. The calculations, so far as it is possible to follow them, often do not make sense. For example, the calculation of Mr and Mrs M's expenses includes a relatively modest annual figure for '*groceries*' but it is not clear that includes all food, probably the largest single expenditure, as having no mortgage their housing costs were relatively small. It is virtually impossible to know if the income figures quoted are net of tax or not; also the tax figure in the fact find was very small on an income which was calculated at $78,000.

7.2 On p6 there appears to be the summary of calculations of income; even if they are correct and Mr and Mrs M really did have a surplus of $8,000 (and it is difficult to know how this figure was arrived at), it is impossible to see how a couple with that surplus could pay $14-15,000 in contributions to a strategy such as that recommended. Or, is the figure of $15,600, included as '*savings*' in the expenses calculation, where that amount was to come from? In the member's defense Mr and

Mrs M were capable savers; they had paid off their house, and saved $25,000 in a managed investment scheme at AMP on a relatively modest income.

There is no documentation of any attempt to renew financial information enquiries for the SoAAs, after the first one. This is a particularly emphatic omission in relation to the last SoAA, since the advice involved commutation of super, and was after the advice from Storm to convert all to cash. The macro-outlook for equity markets had entirely changed as well, and yet Jones did not renew any enquiries about the clients' risk preferences.

(ii) Allegation that no info on risk collected:

7.3 The Confidential Financial Profile completed by Mr and Mrs M at p21 sets out a table of appointments between Jones and Mr and Mrs M, but there is no evidence that risk was discussed at any of them. There is similarly no evidence of what, if any, sort of understanding of risk was imparted. It is possible that the '*Primer Appointment*' was used to discuss risk, but Jones has not argued this or even mentioned it. These facts corroborate the statements of fact made by Mr M that he had never been given a formal risk questionnaire or scenario analysis related to risk.

7.4 The Education workshop, also noted in the table, was we assume a group occasion. If so, there would be no opportunity for discussion of Mr and Mrs M's individual circumstances and the development between Jones and his clients of their risk preference and level of understanding.

7.5 There is no basis in any document the FPA has been able to find, for the risk assessment that is made at p22-23 of the Confidential Financial Profile. From the review of the opportunities for oral discussion above, it is not clear that adequate oral explanation of risk was given. If anything, the documentation of risk that Mr and Mrs M were prepared to run, is that their preference was for virtually no risk; they chose a level involving the risks over the medium to long term being '*minimal or eliminated*'. There is no evidence in any of the documents that the choice of this level was discussed at all; from what we can see it could just as easily have been arbitrarily chosen, or chosen on the basis of intuition or deduction.

7.6 Being more particular about specific risks inherent in the recommended strategy, there is no information collected and no documented attempt to make a matching analysis or client explanation about the risks of the gearing strategy. In the same vein, there is no documented discussion of any strategies which could have been put in place to mitigate the effects of negative returns or risks, on the undiversified equities portfolio. There was, as far as we can see, no discussion of additional death cover to repay the loans, in case say, Mr M died. Likewise there was no discussion that we have any record of, that portfolio insurance was considered. What very little mention of risk there was in the SoA is negated by surrounding text

which is imprecise and obfuscating, and expressed in very general terms that do not at all address the particular circumstances of Mr and Mrs M.

7.7 The opinion of the professional financial planners on the CRC Panel of the member's conduct in relation to Rule 108 is: '*the FPA case for breach of Rule 108 is clear and compelling. The basics of competent personal financial information collection and analysis are missing. The information assembled contains important omissions, is confused and makes no overall sense. The information collection and analysis falls gravely short of even the most modest acceptable standards of financial planning care and competence*'.

7.8 Accordingly, we find that Jones failed to collect sufficient information to ensure he could give suitable advice and has breached FPA Ethics and Rules 108.

In breach of FPA Ethics and Rules 110 Jones provided unsuitable financial strategy or plan for Mr and Mrs M

7.9 We have already discussed above in relation to Rule 108 the serious deficiencies in relation to information collection, prior to advising Mr and Mrs M. We think these deficiencies, especially those in relation to the assessment of risk, also contributed to Jones' diminished capacity to provide his clients with suitable advice.

7.10 Even if Mr and Mrs M had agreed to the advice they were given, it was Jones' responsibility to develop a strategy which complemented Mr and Mrs M's needs. By promoting the Storm strategy to Mr and Mrs M, Jones tried to make the clients suitable for the strategy, rather than researching, analysing and developing a strategy suitable to the clients. Notwithstanding the prescriptive model of the licence holder, Jones was highly familiar with the model and it was Jones who was responsible for assessing the suitability for Mr and Mrs M of any strategy he ultimately recommended to them.

7.11 There is, as we have recounted above, no evidence whatever that Jones carried out any risk assessment. Nor did he detail the significant risks, to a couple approaching retirement, of mortgaging their home and taking on margin credit loans; to then invest all their financial assets in the stock market, in order to pursue a self-funded retirement.

7.12 The outstanding deficiency was in relation to the cash flow analysis. This was entirely unsustainable, and would have collapsed whether or not the GFC had occurred. Page 23 of the original SoA indicates the cash flow projections were for 17 years, though there were several subsequent modifications, especially in the series of SoAAs that were issued. Returning to the original SoA, it had the following serious flaws:

- The cash flow was in deficit, being:

(a) there was a requirement to contribute cash component of $14,000 pa to the strategy, both before and after retirement, when Mr and Mrs M's savings were approximately $8,000 pa when fully employed;

(b) there was no provision for any amount to cover living expenses after retirement, the only possible assumption being that Mr and Mrs M would have to supply their own living expenses outside the strategy;

(c) the cash flow calculations being constantly in deficit meant that the only possible source of cash was the realization of reserves from increases in asset values of the indexed funds. This is only practically useful if units in the investment can be sold or further loans taken out. The availability of these strategies was entirely contingent on the discretion of the banks from whom Mr and Mrs M had already taken loans. The FPA's argument was that regardless of the GFC, very soon the loan facilities would have risen to a point at which they would have become unsustainable, and the banks would have refused to lend further. At that point the strategy would have collapsed;

(d) there was no life insurance in case one partner died, leaving the other to repay debts with out a home; and

(e) the strategy recommended cash reserves of $30,000 (SoA p89) but the clients had only $10,000 cash, and had to borrow $20,000 from the beginning to make up the cash reserves that the strategy required.

7.13 Continuing on, the experts on the panel considered it was in their words '*pretty horrific*' to advise on 10 October 2008 that Mr and Mrs M put more cash into the equity market, through liquidating modest super. Only two days before Storm had advised all its clients through a circular letter, including one to Mr and Mrs M, to go to cash. Jones must have known about this.

7.14 Despite the clients choosing a low level of risk, as a result of the advice of the member they ended up with a loan to valuation ratio of 75%; this is in the face of Storm's own SoA, p62, which advises low levels of gearing when income is modest.

7.15 The opinion of the professional financial planners on the CRC Panel on the member's conduct in relation to Rule 110 is: '*the member has not understood the clients past lack of borrowing experience and experience of investment, and their concern about low risk'.* They wanted risk to be *'minimal or eliminated*' and given the modest level of the clients' income the peer planner panel members believe that the recommendations were completely unsuitable.

7.16 The professional members were of the opinion that home equity should never be included as '*property'* against which gearing strategies could be secured, or available for other *'financialisation'*; they are places to live, especially for retired

people who rely on existing assets for welfare in retirement when they have no income to respond to margin calls, or to replace lost value.

There was a conspicuous failure to undertake any of the professional steps towards a proper suitability assessment and consequently recommendations that were deeply unprofessional.

7.17 Accordingly, here too, the panel finds that Jones breached the FPA Ethics and Rules 110.

In breach of FPA Ethics and Rules 6 Jones Bought Discredit to the Financial Planning Profession

7.18 The quality of the departures from acceptable financial planning practices in this case is egregious. There was serious disregard of the suitability requirement – on a succession of occasions. There was no attempt to properly spell out the risks the clients were being asked to take, and no attempt to explain them in a fashion addressing their financial capability or experience.

7.19 The degree of departure from good and established financial planning practice by Jones is summarised by the professional members of the panel who concluded that the whole plan was devised around benefit to the adviser and the dealer group, and '*set the client on the path to financial ruin*'.

7.20 In particular, there was in the opinion of the peer members '*gross negligence in cash flows*' and '*reckless indifference*' by Jones to the result for Mr and Mrs M. There is particular pertinence in this indifference, since the clients were unsophisticated and of modest means. There was no attempt to give advice that would help the clients to reach their goals or objectives. No thought or effort to achieve these goals is evident. Jones demonstrated no empathy whatever with the clients.

7.21 It was, to quote the peer members again, '*abhorrent behaviour*' that could only be seen as such by peer professionals and the public, the consequence of which is to bring discredit to the financial planning profession. For these reasons the panel finds that Jones breached FPA Ethics and Rules 6.

In Breach of FPA Ethics and Rules 127 – Failure to Co-operate with the FPA

7.22 The evidence of non-cooperation put to the CRC by the FPA was straightforward and uncomplicated. The Investigation Officer concerned had kept an exemplary record of the requests for assistance and the denials, evasions and unreasonable rejections from the member. Further, the member has made no attempt to explain his failure to cooperate, nor made any denial of the veracity of the

FPA's allegations. Accordingly we accept that the member has failed on a number of occasions to cooperate with specific and appropriate requests for assistance with documents and explanations, and we find that in the absence of reasonable excuse for inaction, the member has breached Rule 127 of the FPA's Ethics and Rules.

VIII. FINAL STATEMENT OF DETERMINATION

8.1 For these reasons the CRC finds the following breaches of the FPA Code of Ethics and Rules of Professional Conduct:

(a) Rule 108 - that Jones failed to collect sufficient information to ensure appropriate advice could be given;
(b) Rule 110 - that Jones failed to develop a suitable financial strategy or plan for the Client;
(c) Ethics 6 - that Jones failed to ensure his conduct did not bring discredit to the financial planning profession; and
(d) Rule 127 - that a member must cooperate with the FPA in all investigations.

IX. SANCTIONS

9.1 Since the CRC has found breaches of the FPA Code of Ethics and Rules of Professional Conduct, it is authorised 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 (revised 4 June 2010). They are the sanctions the CRC makes in light of the determinations above and accompanying reasons. These sanctions have also been decided on in the absence of any attempt by Jones to address them, despite being asked for submissions on sanctions. His only response has been to deny the CRC's power to impose them, which we have rejected in Part VI above. There has been no attempt to argue for or against the proportionality or appropriateness of the sanctions the CRC proposed in the next-to-last draft determination.

9.2 There are many reasons why the CRC panel has settled on the maximum sanctions in this case.

The first is the degree of culpability by comparison with other members before the CRC in the past, who had recommended the highly geared Storm strategy. In those cases, although the recommendations were found to be unsuitable, they may have survived profitably as long as the market continued to rise, and had provided tangible financial benefit to the complainants in those cases for a period. It was possible to conclude that these advisers, although profoundly misguided, could have believed that they were assisting their clients.

9.3 In the case of Jones' recommendations to Mr and Mrs M it is unarguable that the strategy recommended was unsustainable, and would have collapsed at some relatively near point in time. This is particularly because, as demonstrated in the reasons above, the clients were required to make large and ongoing financial contributions to the strategy, even after retiring, for which there was no obvious source, even before retiring. The worksheets appended to the SoA and subsequent SoAAs set this out in damning detail.

9.4 The second reason is the combination of incompetence demonstrated by such departures from the usual standards of conduct as have been proved in this proceeding, with the complete lack of insight demonstrated by the member about this degree of incompetence. The character and tone of the correspondence between the member and the Investigation Officer shows no abatement of this lack of insight by the member into his own failings. His correspondence displays a combination of denial and derision of the CRC's proceedings and those who carry it forward. Jones shows no empathy with his clients, would rather blame others, and his constant refrain has been that '*I am a victim too*'. In short the panel has concluded, Jones is not open to assuming responsibility for his conduct or learning from his mistakes. This second conclusion is underlined by the determined refusal to cooperate with the FPA's request for information and materials throughout the proceedings, capped off by refusing to attend the CRC's hearing.

9.5 Finally, the CRC has determined to impose the maximum sanctions on the member because, to again quote the planner members of the panel, '*this is demonstrably the worst financial advice we have been called to review. The sanctions have been decided by reference to sanctions in other like matters we have decided*'. Jones continues in financial planning practice, and this proposal about the sanctions the CRC is minded to impose is also intended to be protective of the investing public.

9.6 Accordingly, the CRC imposes the following sanctions to be applied to the member Bob Jones:

(a) that the member be expelled from the FPA and return to the FPA all indicia of his membership and refrain from holding himself out as a member or as being qualified by any of the marks etc. of the FPA;

(b) that Jones pay the costs of these proceedings in the amount of $1,760 to be paid within 30 days of the final determination in this complaint;

(c) that Jones be fined the amount of $20,000 for the breach of Rule 110;

(d) that Jones be fined the amount of $15,000 for the breach of Rule 108;

(e) that Jones be fined the amount of $20,000 for the breach of Ethic 6; and

(f) that this determination be published in full including the member's name.

END OF DETERMINATION