

FINANCIAL PLANNING ASSOCIATION

CONDUCT REVIEW COMMISSION

SD 2012_1

DECISION OF SUMMARY DISPOSAL

UNDER CLAUSE 8.2A OF THE FPA DISCIPLINARY REGULATIONS 2007

CRC Chair: *Professor Dimity Kingsford Smith*

DATE OF FINAL DECISION: 17 February 2012

FACTS:

The matter concerned alleged breaches of the FPA Rules of Professional Conduct by an AFP Member (the Member) who was an Authorised Representative of a licensee. The Clients (Complainants) complained to the FPA that the Member's advice to invest a total of \$75,000 in two separate property trusts was unsuitable in that it was not consistent with their tolerance to risk. Furthermore, the Member's advice placed that particular investment capital at unsuitable risk.

Between 2002 and 2006 the complainants engaged the Member to provide financial planning advice for their retirement. Throughout this time, the Member made numerous recommendations to the Complainants and to their Self Managed Superannuation Fund ("SMSF").

By a fact find document completed in 2002 (updated 19 February 2003) and signed by the Complainants they instructed the licensee and its authorised adviser (relevantly, the Member) that in financial advice they received they would accept risk only if it were 'conservative, would consider blue-chip investments with the possibility of increasing wealth over the long term'.

By a Statement of Advice in 2004 the Member recommended that the Complainants, who had both retired from full time work and had retirement assets of approximately \$635,000, adopt a particular approach to investing. This approach involved investing 55% of the retirement fund in domestic and international equity investments; 30% in enhanced cash and property investments which seeks to achieve higher returns ; and 15% in a segment of investments which was described as 'a high return/high risk area'. The Complainants accepted the recommendation.

By two separate Statements of Advice in 2005 the Member recommended that the Complainants invest \$50,000 (Investment A) and \$25,000 (Investment B) respectively into two single project property investments in the 'high return/high risk area' of their portfolio. The Complainants accepted the recommendation, which amounted to a total of 11.8% of their investment portfolio.

By 2008 both Investments A and B had frozen their invested funds and for all practical purposes Investments A and B were ultimately lost.

The Complainants lodged a complaint with FOS after unsuccessfully attempting to resolve their complaint with the Member's licensee. The FOS complaint was unable to be resolved and was referred to a FOS Panel for a determination. FOS made a determination that the Member's licensee fully compensate the Complainants in the total amount of their lost investment capital (\$75,000), together with interest at the rate of 4% per annum calculated annually back to the date of each investment. The Member has taken steps to have the Complainants' compensated following this determination, but these steps have as yet been unsuccessful.

BREACH ALLEGATIONS:

Following the FPA's investigation, the complaint was reported to the Chair of the Conduct Review Commission (CRC) who directed the FPA to issue a Notice of Charge to the Member for alleged breaches of Rule 108 (Collect sufficient information to ensure appropriate advice can be given), Rule 110 (Develop a suitable financial strategy based on relevant information collected and analysed) and Rule 111 (Provide an explanation of investment risks in terms that the client is likely to understand).

MEMBERS OWN RESPONSE TO BREACH ALLEGATIONS:

In responding to the alleged breaches, the Member did co-operate with the FPA and displayed a willingness to acknowledge deficiencies in the advice provided. In particular, the Member was able to demonstrate that, notwithstanding his reference to certain mitigating factors, he was in no way attempting to abrogate responsibility for his conduct and that he now has a greater appreciation and understanding of his obligations as a financial adviser and as a practitioner Member of the FPA.

SUMMARY DISPOSAL BY AGREEMENT

As a result of the Member's thorough response to the FPA's concerns, the FPA invited the Member to discuss terms for a summary disposal of the matter. Under clause 8.2A of the FPA's Disciplinary Regulations 2007, the Member and the FPA can have discussions to form an agreement to dispose of allegations in a Breach Notice, without the need for a Conduct Review Commission hearing.

Following such discussions, the FPA reached agreement with the Member whereby the Member acknowledged a breach of Rule 108 (Collect insufficient information to ensure appropriate advice can be given) because:

- While the member was aware of various personal circumstances of the Complainants, such as their pensions, their age, the state of their health and their need for a particular amount of income per year, the original fact find document was completed in 2002 and updated in 2003. The recommendations to invest were made in 2005 without sufficient further inquiry of the Complainant's financial position, needs and purposes;
- The inquiries that were made of the financial position, needs and purposes of the Complainants' were insufficiently specific about risk and questioning the Complainants' attitudes to risk and volatility of investments.
- As a result, the Member failed to understand and implement the Complainants' instruction in the fact find document of 2002 (updated 2003) that they would only accept risk if it were 'conservative, would consider blue-chip investments with the possibility of increasing wealth over the long term'.

Following discussions, the FPA reached agreement with the Member whereby the Member acknowledged a breach of Rule 110 (Develop a suitable financial strategy based on relevant information collected and analysed):

- Given the conservative risk preference of the Complainants and the relatively small size of their portfolio, Investments A and B were unsuitable because they were too risky with very high rates of return, they concentrated the Complainants investments in property to an unacceptable degree and they were in investments in which there was no secondary market.

Following discussions, the FPA reached agreement with the Member whereby the Member acknowledged a breach of Rule 111 (Provide an explanation of the investment risks in terms that the client is likely to understand) because:

- The Statements of Advice of 2005 which recommended Investments A and B did not discuss the specific risks associated with the investments;
- The Member did not explain orally or otherwise the potential consequences that the risks of the Investments A and B could have on the financial welfare of the Complainants.

SANCTIONS IMPOSED BY AGREEMENT:

The FPA and the Member gave consideration to suitable sanctions to be imposed for the breaches of Rules 108, 110 & 111 having regard to the following factors:

- the Member's contrition demonstrated in fully and frankly admitting the breaches;
- the steps taken by the Member to learn from the experience and to rehabilitate;
- the Member's subsequent greater appreciation and understanding of his obligations as a financial adviser and as a practitioner Member of the FPA;
- the Member's inability to act outside of the conduct of the Member's licensee at the time;
- the Member's conduct in subsequently instigating enhancements and initiatives within financial services operations at the Licensee business;
- The Member currently being authorised under the AFSL of a financial services business of whom all Directors are long standing CERTIFIED FINANCIAL PLANNER® professionals.
- Steps taken by the Member to have the Complainants compensated in accordance with the FOS Decision.

FPA reached agreement with the Member as follows:

1. That the Member acknowledges a breach of Rule 110 and is fined \$1500 and undertakes to provide the practitioner's most recent and next two external audits (6 monthly) to the FPA General Manager Professional Standards and for the practitioner Member to complete the FPA Professionalism component of the CFP® Certification Program;
2. That the Member acknowledges a breach of Rule 108 and is fined \$1500 and undertakes to provide the practitioner's most recent and next two external audits (6 monthly) to the FPA General Manager Professional Standards and for the practitioner Member to complete the FPA Professionalism component of the CFP Certification Program;

3. That the Member acknowledges a breach of Rule 111 and is fined \$1500 and undertakes to provide the practitioner's most recent and next two external audits (6 monthly) to the FPA General Manager Professional Standards and for the practitioner Member to complete the FPA Professionalism component of the CFP Certification Program.

That no public interest (i.e. general or specific deterrence or in educating the profession) would be served in the public identification of the Member in any published report of these agreed outcomes that could not otherwise be achieved via anonymised publication. Accordingly the FPA agrees not to identify the Member in any report of the outcome.

Upon making of the agreement between the FPA and the Member, the Chair of the Conduct Review Commission reviewed and endorsed the agreement.