

FINANCIAL PLANNING ASSOCIATION

CONDUCT REVIEW COMMISSION

SD 2013_1

TERMS OF SUMMARY DISPOSAL DETERMINATION

UNDER CLAUSE 8.2A OF THE FPA DISCIPLINARY REGULATIONS 2007

CRC Chair: Professor Dimity Kingsford Smith

DATE OF FINAL DECISION: 13 September 2013

FACTS:

This matter concerned alleged breaches of FPA Rules of Professional Conduct by a CFP® Member (the Member) who was an Authorised Representative and the principal of a Corporate Authorised Representative of a Licensee. The substance of the clients (Complainants) complaint was that the Member's recommendations to them in May 2005 and March 2008 were unsuitable and that they did not understand the risks of accepting the Member's recommendations of March 2008 in particular.

In April 2005, the Member met with one of the Complainants (the other was overseas) for the purpose of seeking financial planning advice following the sale of their home, the winding back of business interests and their intention to reside and work temporarily overseas. A fact find document and file notes were prepared – referring to an investment timeframe of '3-5yrs +' and 'at least 3-5 years', respectively.

In May 2005, the Member met with both Complainants and presented them with a Statement of Advice (SOA), which was explained to them before they took it away to read. This SOA indicated that the Complainants intended to 'travel overseas and work for a couple of years'. Objectives included:

- Invest \$600k for long term capital growth.
(The Complainants had additional cash funds to be managed by them in a deposit account to provide for living expenses).
- Flexibility to alter the portfolio should either economic conditions or your financial situation or objectives change.

The SOA also:

- Classified the Complainants as having a risk profile between balanced and growth.
- Recommended an 80 / 20 asset allocation.
- Revealed a minimum timeframe of either 5 or 7 years for the majority of the recommended investments.

The Member's file note relating to this meeting states 'funds are earmarked for long term (at least 3-5 years)'.

In June 2005 the Member met with both Complainants, who accepted the Member's financial plan before temporarily moving overseas. The Complainants' investment portfolio peaked to a high of about \$905k in October 2007.

The Member was informed in November 2007 by phone that the Complainants had returned to Australia. The Member received a further email in February 2008 confirming the Complainants permanent residency back in Australia.

The value of the Complainants' investment portfolio had fallen to below \$780k and in March 2008 the Complainants sent an email to the Member expressing 'grave fears about where our portfolio is headed' and unequivocally stating, 'We require you to withdraw our funds immediately before any further losses are incurred'.

The Member responded that same day with, among other things, 'I understand your concerns and the worst thing you could do now is withdraw the funds' and 'I suggest that we get together face to face and discuss the situation. If after then, you still feel the same way, we will complete the necessary paperwork to redeem the funds'.

Two days later the Member had a lengthy meeting with the Complainants. The Complainants say that at this meeting they informed the Member of their intention to redeem their portfolio, deposit the proceeds in a term deposit at an interest rate >8% and purchase a residential property. The Member explained to the Complainants that liquidating their investment portfolio would result in them missing out on future market gain. The Member also provided an 'overview' of how the Complainants could retain their investment portfolio and to provide the cash flow that was required (to service borrowings on a residential property). The Complainants say they relied upon the Member's professional advice during this meeting and were convinced to search for a suitable property to purchase and not redeem their portfolio in accordance with the Member's recommendations.

Subsequent to that, there were various communications between the Complainants and the Member, however the relationship broke down and in June 2008 the Complainants sought to redeem their portfolio when the total value had fallen to about \$726k. There were ongoing communication issues and as time went on a further dilemma for the Complainants around redeeming their investments in view of continuing downside volatility of their investment. The Complainants ultimately redeemed the majority of their investments in October 2009 to the total value of about \$646k, and additionally had a 'frozen' investment to the value of about \$18k.

The Complainants complained to the FPA.

The Complainants received an undisclosed amount of compensation in a confidential settlement, independent of the FPA, in 2013.

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); Rule 111 (Provide an explanation of investment risks in terms that the client is likely to understand).

MEMBER'S OWN RESPONSE TO BREACH ALLEGATIONS:

The Member's response demonstrated real regret, along with a realistic understanding of how the difficulties grew in the first place (a very assertive client). Equally importantly, there is a real acceptance of using this experience to grow understanding and to change conduct and processes personally as a financial planner and in the routines of the business. The FPA accepts the Member's explanation that any breaches were unintentional and that the Member was at all times well intended.

SUMMARY DISPOSAL BY AGREEMENT

As a result of the Member's response to the FPA's Breach Notice, 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 discussions, the FPA reached agreement with the Member whereby the Member acknowledged a breach of Rule 108 (Collect sufficient information to ensure appropriate advice can be given):

1. In relation to the strategy that the Member recommended for the Complainants at the meeting in March 2008, to continue to hold their portfolio and to borrow money to purchase their main residence, the Member failed to make satisfactory inquiries of the Complainants.
2. By early 2008 the Members knew that the Complainants had returned from overseas to resume living permanently and had no home. The Member knew that their portfolio had recently lost a lot of capital value about which they were concerned and that the financial climate had worsened significantly.
3. The Member collected insufficient information about their new circumstances and risk preferences.

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):

1. When issuing the Statement of Advice (SOA) to the Complainants in May 2005, the Member recommended a growth or high growth portfolio of \$600,000 of investments. The information about the Complainants collected by the Member prior to making the recommendations in the SOA, showed the Complainants jointly, had a risk preference that was balanced, not growth or high growth.
2. When issuing the Statement of Advice (SOA) to the Complainants in May 2005, the Member recommended a growth or high growth portfolio the appropriate duration of which was 5-7 years. In doing so the Member overlooked that the Complainants had a risk preference for a balanced portfolio, and 3 years was a more suitable time frame.
3. The suitability of the 3 year time frame was further indicated by the fact that the Complainants had sold their home, were going to live overseas, and would likely return to Australia and wish to purchase a new home within that 3 year time frame. In the events that followed, this is what in fact occurred.
4. At a meeting with the Member in March 2008 and in email communications immediately beforehand (March 2008), the Complainants expressed their concern about the progress of their portfolio and the then current financial situation. They had just returned to live permanently in Australia, were looking to buy a home and were concerned about preserving their portfolio, which had recently lost significant value.

5. Instead of acceding to their request to liquidate the portfolio, the Member proposed a strategy for the purchase of a home with borrowed funds and without switching the portfolio to cash. Leaving the portfolio intact at a time of increasing market volatility when the Complainants had said they were concerned about capital preservation and did not wish to continue was a breach of the requirement to provide suitable advice. The Member should have realised the Complainant's risk preference had become more conservative. The same applies to the Member's recommendation that the Complainants take out a large loan when they could have purchased a home with their own capital.

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:

1. At a meeting in March 2008, reduced to writing in a file note of that date and in follow up email communications, the Member recommended a strategy for the Complainants to continue to hold their portfolio and to borrow money to purchase their main residence.
2. In none of the communications with the Complainants did the Member explain the additional risks of keeping the portfolio in an increasingly volatile financial climate, despite the Complainants having expressed their concern about recent loss of capital value. Nor did the Member explain the additional risks (such as not being able to meet repayments and interest) of taking out a home loan.

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:

1. The Member's cooperation with the FPA and demonstrated contrition;
2. Motivation for the breaches;
3. The Member's disciplinary record;
4. The length of time since the conduct subject of the Breaches;
5. The Complainants have been compensated.

FPA reached agreement with the Member as follows:

1. That the Member acknowledges a breach of Rule 108 and is reprimanded, fined \$1000 and undertakes to complete specified training on the FPA Code of Professional Practice (effective July 2013).
2. That the Member acknowledges a breach of Rule 110 and is reprimanded, fined \$1000 and undertakes to complete specified training on the FPA Code of Professional Practice (effective July 2013).
3. That the Member acknowledges a breach of Rule 111 and is reprimanded, fined \$1000 and undertakes to complete specified training on the FPA Code of Professional Practice (effective July 2013).

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, that could not otherwise be achieved via anonymised publication. Accordingly the FPA agrees not to identify the Member in any report of this determination.

The Member remains a member of the FPA and has through continuing assistance to the investigation, negotiating this agreement and other expressions of contrition demonstrated desire and capacity to continue as a compliant and professional financial planner. Proceeding to a hearing may turn the Member away from this encouraging and restorative course because of its adversarial quality.

Upon making of the agreement between the FPA and the Member, the Chair of the Conduct Review Commission has approved the agreement and determined that the allegations in the Breach Notice be summarily disposed of on these terms.