

CONDUCT REVIEW COMMISSION

DETERMINATION AND REASONS FOR DECISION

Mr Paul Florence

PANEL MEMBERS: *Mr Michael Perkins (Chair)*
Mr Gregory Cook
Mr James Cotis

DATE OF HEARING: 7 October 2011

DATE OF FINAL DETERMINATION: 23 November 2011

PARTIES' REPRESENTATIVES: *Mr Daniel Ezzy (FPA)*

*Mr Florence did not attend or
appear*

Determination and Reasons for Decision

Summary of Determination and Reasons

The Conduct Review Commission Panel (CRC Panel) convened to hear this complaint, finds that the member Paul Anthony Florence Membership number 017962 (Florence), made investment recommendations to the complainants Mr and Mrs N that:

1. contained misrepresentations
2. were not suitable or appropriate for the complainants,
3. did not use terms the complainants were likely to understand, to explain the reasons for the proposed move of investment capital, that substantiated the appropriateness of the move, and
4. failed adequately to explain the investment risks involved in the recommendations.

The CRC Panel also finds that Florence's conduct amounted to a gross breach of Ethic Principle 6 that has brought discredit to the financial planning profession.

The Panel finds that all of these breaches occurred with the highest disregard for the instructions received by Florence, the reliance placed on Florence by the complainants and the responsibility of Florence as an FPA member.

There was no evidence of conduct by Florence of a deceptive, dishonest or fraudulent nature.

Sanctions imposed by the Panel

Since the CRC Panel has found breaches of the FPA Ethics and Rules it is authorized to impose sanctions. Those sanctions are available by force of paragraph 3.5.1 of the FPA Constitution and paragraphs 1.2 (definition of sanctions), 9.9 and Schedule B of the Disciplinary Regulations adopted by the FPA Board on 17 July 2007 (revised 4 June 2010).

The Panel determines that having regard to the disregard exhibited by Florence to the financial strategies already established by the complainants previous financial adviser, the incompetence exhibited by Florence in relation to the complainant's superannuation and Centrelink entitlements, the damage triggered by Florence promoting unsuitable and inappropriate advice to the complainants, the denial of responsibility and accountability to the complainants by Florence, the lack of contrition shown by Florence and the gross breaches of Ethics Principle 6:

1. That Florence be expelled from the membership of the FPA, and
2. That Florence be disciplined by the publication by the FPA of these findings in full including:
 - a. The name of the member
 - b. The breaches proven against the member
 - c. The sanctions imposed against Florence, and
3. That Florence pay the costs of these proceedings in the amount of \$4300.28.

Determination

This CRC Panel determines that the charges are proven to the extent set out in this determination:

Charge 1 – Rule 101 of the Rules of Professional Conduct

That Florence has, in the conduct of his professional and business activities, engaged in conduct and acted in a way that was misleading to the complainants.

Charge 2 – Rule 110 of the Rules of Professional Conduct

That the recommendations prepared for the complainants by Florence were not suitable for their objectives or circumstances.

Charge 3 – Rule 118 of the Rules of Professional Conduct

That the change of investments recommended by Florence was not appropriate for the complainants.

Charge 4 - Rule 111 of the Rules of Professional Conduct

That the explanation of the nature of the investment risks involved in the recommendations given to the complainants by Florence were not in terms that the client was likely to understand.

Charge 5 – Rule 6 of the Code of Ethics (Professionalism).

That the conduct of Florence has brought discredit to the financial planning profession.

Reasons for Decision

The Complaint

This complaint initiated charges being made against Florence by the Financial Planning Association of Australia Ltd ABN 62 054 174 453 (FPA) in its disciplinary capacity under its constitution, disciplinary regulations rules of professional conduct and code of ethics. These charges are contained in a letter dated 29th July 2011 from the FPA to Florence and were the subject of further correspondence and clarification between the FPA, the member and his solicitor.

This complaint was made in writing by Mrs and Mr N (the complainants) on 27 February 2009. The complainants were clients of Mr Paul Florence, an associate financial planning member of the FPA. Mr Florence was, at all material times, an authorised representative of Storm Financial Limited.

The complainants gave oral evidence to the CRC Panel hearing on the 7th October 2011 that amplified the written evidence they had tendered to these proceeding by their joint written statement dated 27 May 2011 and apparently signed on our about the 13th July 2011.

The CRC Panel has accepted the truthfulness of the evidence of the complainants and relies, in part, on the written and oral evidence of the complainants in this determination.

The CRC Panel has also considered the correspondence between representatives of the FPA and Florence that has been tendered in these proceedings including the denial of liability by Florence that is contained in the letter between his solicitor Mr. Tim Hewison and the FPA dated 13 July 2010 (Exhibit 17 in the Brief of Evidence tendered to the hearing on 7 October 2011 (the hearing)). This denial of liability was also contained in letters from Mr Hewison to the FPA by letters dated 4th August 2011 and 8th August 2011.

The CRC Panel takes particular note of the following words in exhibit 17, “our client is not responsible for any of the loss that may be suffered by Mr. and Mrs N”.

The CRC Panel has determined that Florence has been given adequate time and opportunity to test the evidence tendered by the FPA in these proceedings. Florence declined to take part in the hearing.

The CRC Panel has therefore determined that it will make its determination on the basis of the brief of evidence tendered to it in the course of these proceedings.

Reasons

Charge 1 – Rule 101 of the Rules of Professional Conduct

This charge states:

In the conduct of professional and business activities, a member shall not engage in any act or omission of a misleading, deceptive, dishonest or fraudulent nature.

Generally, for conduct to be misleading, there must be a representation or conduct amounting to a representation (e.g. silence which allows a misunderstanding to persist) inducing error or misconception. The other person must rely on that conduct. It is possible for factually true statements to be misleading if the associated circumstances contribute to error or misconception. In the same way, silence may be misleading. A member acting honestly may nonetheless engage in misleading conduct.

At line 39 on page 40 of the hearing’s transcript and following, Mr N makes the following statements:

“MR N: And I said, “Our home has to be sacrosanct, Paul. I’m not interested in putting our home at risk at any stage.” And he was very forceful in saying, you know, our home would never be at risk. And I said, you know, I just don’t want a thing – and he said, “Look, it will never be at risk.”

“Look, Paul, we’re not here because of Storm. We are here because you,” – and Mrs N said, “We’re here because we believe that you like people.” And she got very emotional about that, and for some silly reason it embarrassed me a little bit. But that’s how we felt at that stage. And he said – I remember him saying, particularly to Mrs N, he said, “If it came to the stage where it went awry,” and he said, “It’s never happened in history where the market has dropped,” – I think it was 22,800 points – “it’s never happened in history

but if it came to that stage,” he said, “I’d make payments for you.” Now, that was the statement made.”

On page 50 of the hearing’s transcript, there is recorded the following interaction between the FPA investigations officer Mr Ezzy and Mrs N:

“MR EZZY: Okay. Did you have a conversation with Paul around – in general discussing that you’re not there because of Storm, you’re there because of him?”

MRS N: Absolutely.

MR EZZY: And how was – what is your recollections of that conversation? If you could just repeat to the best of your knowledge.

MRS N: We were trying to get across to him that we weren’t interested in the Storm structure and we wanted just his financial help with investment, without involving ourselves with Storm.

MR EZZY: Yes. And did – is it fair to say that – did you have a conversation with him and said:

Paul, we’re here because of you, not Storm. We’re here because we trust you.

MRS N: Absolutely.”

On pages 59 and 60 of the hearing’s transcript, Mr N makes the following statement:

“And something like Storm had just come out of left field and we had never heard of it and didn’t fully understand it. And the thing seemed to take a little bit of time to be put in place, and the longer it took to put in place, the edgier I became about it, I suppose. And so Mrs N started becoming the same way.

And that’s when I said to him one day, you know, “We’re not really sure if this is what we want to do,” you know, “It’s not a hit.” And he said, “Oh, no, no, no, no. It’s fine. It’s going on. It’s going on,” you know. And that – probably when he – as it says down the bottom of the page here, that the plan goes ahead, that when we pass on our children can just pick up the traces and follow on, and that was something we thought was great. We thought, well, that sounds good, you know. So that sort of won us over that we keep going in it.”

Mr and Mrs N have in their evidence confirmed the clarity with which they expressed their intentions and requirements to Florence. By his statements and actions Florence led the complainants to believe that the Storm strategy being recommended was not only suitable for them in their retirement but their successors following their death (the *errors or misconceptions*). The panel determines this conduct by Florence is not consistent with normal or prudent professional practice of a financial planner and resulted in errors or misconceptions made by the complainant as a result of his conduct. The CRC Panel determines these errors or misconceptions evidence a flagrant breach of rule 101 of the FPA.

We determine therefore, Florence has, in the conduct of his professional and business activities, engaged in conduct and acted in a way that was misleading to the complainants.

Charge 2 – Rule 110 of the Rules of Professional Conduct

This charge states:

In preparing oral or written recommendations to clients, a member shall develop a suitable financial strategy or plan for the client based on the relevant information collected and analysed.

The word suitable means right or appropriate for a particular person, purpose or situation. The complainants had, on the advice of previous advisers, established a superannuation strategy that delivered them Centrelink as well as superannuation benefits. Implementation of the recommendations of Florence caused the complainants to breach superannuation law and incur the risk of substantial penalties.

Tab 22 of the brief of evidence of these proceedings sets out correspondence about the superannuation law non-compliance that was triggered by the implementation of the recommendations made by Mr Florence.

The CRC panel determines that the handling of the superannuation aspect of the recommendations did not follow normal professional practice of financial planners and irrespective of the cash flow representations and gearing aspect of the recommendations, the triggering of superannuation law non compliance through the operation of the recommendations evidences a substantial lack of competence on the part of Florence as well as unsuitability of the recommendations to the circumstances and objectives of the complainants.

We also find the recommendations of Florence deficient in that there was no analysis of the benefits currently being enjoyed by the complainants from their current superannuation strategy and the impact on them of the loss of those benefits through adopting the recommendations. The incurring of the financial penalties and remediation costs by the complainants of the superannuation law breaches is evidence of the unsuitability of the initial recommendations.

We determine therefore, the recommendations prepared for the complainants by Florence were not suitable for their objectives or circumstances.

Charge 3 – Rule 118 of the Rules of Professional Conduct

This charge states:

“A member shall not move a client or cause a client to move from an investment to another investment without explaining to the client, in terms the client is likely to understand, the reasons for the move. The member must demonstrate that the move is appropriate for their client.”

The Panel determines that because Florence has not provided any evidence in these proceedings of the appropriateness of the recommendations for the complainant, he has not satisfied the test in the last sentence of this rule.

Culpability for other egregious conduct under this charge must also be considered.

In the Enforceable Undertaking given by AMP Financial Planning Pty Limited to its regulator the Australian Securities and Investments Commission (ASIC) on 27th July 2006 at page 9 para 3.2, the view by ASIC was confirmed that when an adviser is recommending the replacement of one product with another, s.945A (1) of the Corporations Act requires that an adviser determine enquire and consider the existing product. ASIC's view was that if there is only limited consideration given to the other product, then the advice would be insufficient.

The Panel determines that Florence did not meet this standard of conduct in dealing with the complainants because the impact on the clients of the gearing and superannuation strategies recommended by Florence were not sufficiently or appropriately explained.

The following extract from page of the Transcript evidences the conduct we find most egregious:

“MR COOK: - - - Mr N, at that initial meeting, was there any – I mean, Mr Florence, I guess there is a time delay, but he had a basic understanding of your circumstances because you had dealt previously with the bridging finance. But did, you know, he apprise himself of your current circumstances, you know, that you had a self-managed superannuation fund and so on, prior to sort of launching into the Storm sell job, as you put it?

MRS N: He did know that, and that was my main concern. I did say to Paul, “We’ve got a self-managed fund, we want that continued.” And he said, “Well, that will be all organised, don’t worry about it.” And that was a concern that he just brushed over the fact that it just seemed like it was any other investment, which it wasn’t.

MR N: Could I just add one thing there. At the initial meeting we had with Paul in around 2004, whenever it was, he didn’t ask anything about what we had invested. All we talked about was the bridging finance. At the end of that meeting he said, “Well, can I help you with anything else?” And we said, “No, we’ve got our monies – we have our financial adviser and we’re very happy with the way things are going,” and that was all, he knew nothing there. When we went this time he had spent – obviously had a discussion with Mr and Mrs

N son in law, and Mr N's daughter but I think it was mainly the son in law, so he had indicated to Paul what our situation was, he had filled him in a lot more."

This lack of regard for the existing superannuation and associated strategies is further evidenced by the following exchange at page 55 and following of the transcript:

"MR EZZY: So it's fair to say that in the SoA, in your statement and it's also in the SoA, Paul has recommended that you borrow \$300,000 from your NAB equity – sorry – NAB from your property.

MR N: Yes.

MR EZZY: Against the property.

MR N: Yes.

MR EZZY: And your home was worth around 500,000 at the time; is that correct?

MR N: Probably close. Just under at that time, Daniel, yes.

MR EZZY: Yes. And he recommended borrowing \$450,000 in a margin loan?

MR N: Yes.

MR EZZY: And he recommended the withdrawal of your self-managed super fund from its BT Westpac Wrap account?

MR N: Yes.

MR EZZY: Okay. And then he made recommendations to put these into Storm financial managed funds?

MR N: Yes, the one – excuse me, I've just got to cough, mate.

MR EZZY: Yes.

MR N: Sorry. There we go.

MR EZZY: Yes. Okay.

MR N: There was the complying part, I remember on that - - -

MR EZZY: Yes.

MR N: - - - that it said about withdrawing that. And Mrs N said to him, "That can't be touched, can it?" And she said, "That can't be touched, can it?" Or "can it?" as a question to him. And he said, "Leave that to me."

The subsequent evidence of fund non compliance and the actions taken to remedy the action initiated by the recommendations and actions from Florence evidence the most serious failure in regulated, not just professional conduct. In redeploying the investment capital of the self managed superannuation fund without evident regard to the strategies being implemented the fund evidences gross incompetency by Florence in this matter.

Actions that achieve a suitable result for a client are the appropriate result of a financial planners conduct. The word "appropriate" is an adjective that means "suitable or proper in the circumstances".

The financial advantage being represented as flowing from the Storm strategy was not explained by reference to the effect the gearing being entered into by the client had to amplify both the risks and benefits of the strategy.

In their testimony, the complainants showed themselves to be knowledgeable but unsophisticated investors and certainly did not evidence any innate understanding of the sophistication of the Storm strategy. They allowed their trust of the relationship with Florence to nullify any reservations they held about the recommendations made. The imbalance of knowledge between Florence and the complainants about the operations and risks of the Storm strategy create a special relationship between adviser and client that must be

dealt with carefully. The following extract from the Hospital products case is instructive¹:

“The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position. The expressions “for”, “on behalf of” and “in the interests of” signify that the fiduciary acts in a “representative” character in the exercise of his responsibility, to adopt an expression used by the Court of Appeal.”

The vulnerability of the clients is evidenced by the reliance statements from the transcript cited above.

Whether the relationship between Florence and the complainants amounts to being fiduciary is not necessary to decide in these proceedings. The trust in which they held Florence amounted to a vulnerability or special disadvantage of the clients to the influence of Florence to which Florence has a professional obligation to respond.

The complainants were led to a false sense of security by Florence, a man in which they had developed deep trust, directly and through the referred trust by the engagement and approval to the recommendations of Florence by the complainant’s son in law.

The trust held by the complainants in Florence displaced any rational decision making process they might otherwise apply to the recommendations. By any objective observation, the complainants by their conduct diminished their capacity to be an independent minded critic of the advice they were receiving. Florence, on the facts presented cannot ignore the reality or consequences of this reliance by the complainants on him.

The risk aversity of the clients was clearly in evidence through the investment risk selection they completed as part of the documents that evidence the Storm advisory process. This is also supported by the transcript extracts quoted above.

The clients were experienced investors and clearly understood that a measure of risk was required to gain investment returns. It is the level of risk the clients were exposed to having regard to their stated requirements that leads to the conclusion that the recommendations were inappropriate.

In determining that on the facts presented the recommendations of Florence were unsuitable for the needs of the complainants, and having regard to the matters now discussed, the CRC Panel also concludes that the recommendations of Florence were not appropriate for the complainants.

¹ <http://www.austlii.edu.au/au/cases/cth/HCA/1984/64.html>

The Panel determines, in recommending a change of investments explaining to the client, Florence did not use terms the client is likely to understand, to explain the reasons for the move that substantiated the appropriateness of the move.

Charge 4 - Rule 111 of the Rules of Professional Conduct

This charge states:

In preparing oral or written recommendations to clients, a member shall provide an explanation of the nature of the investment risks involved, in terms that the client is likely to understand.

For the reasons set out in relation to charges 1-3, we determine therefore, the explanation of the nature of the investment risks involved in the recommendations given to the complainants by Florence was not in terms that the client was likely to understand.

Charge 5 – Rule 6 of the Code of Ethics (Professionalism).

This charge states”

A member shall ensure their conduct does not bring discredit to the financial planning profession

The term “professionalism” means the competence or skill expected of a professional. Discredit means the loss or lack of reputation or respect. It is the damage caused to the reputation of professional financial planners by the conduct of Florence that has been of considerable reflection by the Panel.

It is a client’s expectation of professional conduct that imposes the initial burden of professionalism on an adviser. Community expectations of professional conduct are captured in the professional rules of organizations such as the FPA. Members of the FPA are expected to be exemplars to the community of appropriate professional conduct.

Florence by the evidence in this matter was previously well regarded by members of his community and had a history of satisfactory business relationships with the complainants and their family.

Disrepute means the state of being held in low esteem by the public. The complainants are members of the public and their low esteem of Florence is well evidenced by their testimony. The involvement of other members of the public in this matter are in evidence in the proceedings including the following exchange at page 59 of the transcript:

“MR COOK: So was your son-in-law, , sort of in the picture at all or sort of, you know, promoting – well, not promoting perhaps but reassuring you at this time or - - -

MR N: Well, I – yes, Greg, I’ve got a very high opinion of our son in law, and I still do to this day, he is quite an intelligent guy. And after Paul had given us – we had been to that night where all the people were there, and we had a

chat with Paul, and I said – I asked a question, I said, “Are your son in law and daughter in this?” And he said, “No.” That’s when he said they can’t afford it at this stage.

MR COOK: Yes.

MR N: They are mortgaged up to the hilt, etcetera, etcetera. And just to satisfy me, I said to Paul, “Are you prepared to come out,” – now we lived in – Our son in law lived in Murrumbena which is well over the other side of Melbourne. I don’t know whether you know our geography down here.

MR COOK: Yes.

MR N: I said, “Are you prepared to come out to Our son in law and Our daughter’s and do this same presentation to them that you’ve given to us?” And he said, “Yes, I am.” I said, “I’ll get back to you.” So then I got in touch with our son in law and explained the situation and I said, “Are you prepared, you know, just to satisfy us, for Paul to come out here and give you this presentation on Storm?” And our son in law said, “Yes. Fine. No worries.” So he came out to their place and I sat there, and I had no input at all. He just went from go to woe like he had with us on the first occasion.”

The Panel also takes note of the following extract at page 52 of the transcript that further evidences the public activity of Florence in following his practices:

“MR EZZY: So it happened on or about 4 January 2008 that you went to the Werribee office?

MR N: Yes, that was when it was around the 16 or 19 people there.

MR EZZY: Yes. And that – was that a forum or discussion about the Storm strategy?

MR N: It was all about Storm. The whole meeting, or night, was centred around Storm and putting all the potential investors through – you know, because nobody had signed up at that stage, all the people who were there, and it was just to take us through it all. And it was pretty much what we had already sat through one-on-one with Paul, only this time it was a group of people there - - -“

The Panel also takes note of the following evidence by Mr N on page 77 of the transcript:

“The next morning the phone rang and it was Paul’s office lady and she said, “I’m just ringing to let you know that the meeting has been cancelled today.” And I said, “What do you mean been cancelled?” And she said, “It can’t go ahead.” And I said, “No, no, I need to see him today.” And she said, “Well, he has been advised by Storm to lock the office, close the office and to go home and speak to nobody.” And about that time, that’s about when it finished, I suppose, our association.

MR EZZY: Okay. Right. We’ll - - -

MR N: He wasn’t even going to tell us. As a matter of fact, he – I remember Our son in law has told us since that Paul rang him up and said, “Tell them that they’ve lost everything.” And Our son in law said, “I beg your pardon?” He said, “Tell Mrs N and Mr they’ve lost everything.” And Our son in law said he just lost the plot and just screamed at him, “You expect me,” – you know. So it went from there. It just got worse.”

Florence in his role as a financial planner is an exemplar, for better or worse, to both his local and professional community. He has by his actions evidenced in these proceedings, placed his conduct in public knowledge affecting people other than the complainants. As a result, he has brought disrepute to the financial planning profession at large.

The Panel determines that the conduct of Florence evidenced in these proceedings does not meet the competence or skill expected of a member of the FPA . Observation of Florence’s conduct in this matter by a member of the public cannot enhance the reputation of the financial planning profession.

The lack of contrition and denial of liability by Florence that is in evidence in these proceedings further evidences the lack of professionalism by Florence that heightens the disrepute generated by his conduct.

Florence has tried to neither explain or defend his conduct other than simply to deny liability or responsibility to the complainants in correspondence from his lawyer.

The Panel cannot conclude that the conduct of Florence evidenced in these proceedings supports or enhances the reputation, esteem or credit of the financial planning profession.

For the reasons set out in relation to charges 1-4 and the further matters now discussed, the Panel determines that the conduct of Florence has brought discredit to the financial planning profession and this conduct amounts to a gross breach of Principle 6 of the FPA Code of Ethics.