

IN THE FINANCIAL ADVISERS DISCIPLINARY COMMITTEE

WELLINGTON REGISTRY

[2018] FADC 008

Under Part 4 of the Financial Advisers Act 2008

BETWEEN **FINANCIAL MARKETS AUTHORITY** an independent Crown entity
established under the Financial Markets Authority Act 2011

Complainant

AND

B

Respondent

AGREED SUMMARY OF FACTS

Dated 13 June 2018



Solicitor Acting:

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SUMMARY OF FACTS

Introduction

- 1 On 29 March 2018, the Financial Markets Authority (the **FMA**) referred a complaint to the Financial Advisers Disciplinary Committee regarding likely breaches of the Code of Professional Conduct for Authorised Financial Advisers (the **Code**) by B.
- 2 As an AFA, B is bound to meet the conduct obligations prescribed by the Financial Advisers Act 2008 (**the Act**), as well as the Code. The FMA considers that the conduct complained of is likely to be in breach of the following Code Standards:
 - a Code Standard 8: When providing personalised service to a retail client an Authorised Financial Advisor (**AFA**) must take reasonable steps to ensure that the personalised service is suitable for the client; and
 - b Code Standard 12: An AFA must record in writing adequate information about any personalised services provided to a retail client.

Background

- 3 On 23 May 2016, the FMA received a report from a Qualifying Financial Entity (**the QFE**) dated 20 May 2016 (**the QFE report**). The QFE is the administrator of a Financial Adviser network.
- 4 The QFE report set out the process undertaken by the QFE between July 2015 and approximately 31 March 2016, to investigate AFAs within the Financial Adviser network having relatively high levels of replacement business between 2011 and 2015. The QFE report set out the QFE's investigation of the four AFAs having the highest levels of replacement business in that period. B was one of the AFAs identified.
- 5 B has been registered as an AFA to provide Financial Adviser Service, from 11 February 2011. B provides their services through a Registered Financial Services Provider (**RFSP**), which provides the following services: Employer or principal of a financial adviser and/or Qualifying Financial Entity. The RFSP is not a QFE and is part of the Financial Adviser network.
- 6 As a result of receiving the QFE report, the FMA instigated an investigation into the findings set out in the QFE report.
- 7 The FMA investigation involved:
 - a Obtaining further information from the QFE, regarding the issues and client files referred to in the QFE report;
 - b Writing to B to notify him of the FMA's investigation;

- c Reviewing copies of the client files referred to in the QFE report;
 - d Interviewing B on 25 August 2016;
 - e Attempting to contact B's clients, whose files had been reviewed as part of the investigation, including:
 - i Emailing the clients, using addresses held on their files; and
 - ii Telephoning the clients, using phone numbers held on their files.
- 8 The FMA was only able to make contact with clients relating to one of the files of interest (Client 6(a) and Client 6(b)).
- 9 The FMA's referral relates to transactions involving the following six clients:
- a Client 1;
 - b Client 2;
 - c Client 3;
 - d Client 4;
 - e Client 5(a) and Client 5(b); and
 - f Client 6(a) and Client 6(b).

Client 1

- 10 B provided advice to Client 1 in July 2014, regarding the replacement of their life and trauma insurance. At that time Client 1 held life and trauma cover with the QFE. B prepared an SOA to Client 1 providing price comparisons between:
- a Four providers for life insurance at \$100,000 and \$170,000 cover; and
 - b Three providers for \$15,000 trauma cover.
- 11 B recommended that Client 1 take out \$170,000 life cover and \$15,000 trauma cover with another provider on the basis that the other provider provided the best balance of competitive pricing and benefits. Client 1 did not take any action at that time.
- 12 On 4 February 2015 Client 1 signed an Authority to Proceed, giving B authority to proceed to obtain life cover at \$150,000 and trauma cover at \$30,000 for Client 1 with the other provider.
- 13 On 19 February 2015, some 8 months later, B wrote to Client 1 identifying the differences between Client 1's current insurance and the recommended cover and the risks of changing providers. B again recommended that Client 1 change providers.

- 14 Thereafter Client 1 took out policies with the other provider for \$150,000 life cover and \$30,000 trauma cover. These levels of cover differed from those recommended.
- 15 B's file did not contain the following documentation:
- a A comparison of premiums at the levels of cover that Client 1 ultimately acquired; and
 - b An updated price comparison, to allow for the passage of time since the original recommendation (Client 1 having had a birthday in the meantime, such that the premiums may well have changed).
- 16 During the FMA interview B acknowledged that filenotes of discussions with Client 1 had not been made and the file did not record all of the advice to Client 1. Accordingly, it was not possible from the file to ascertain the adequacy of B's advice to Client 1.
- 17 Despite attempts, the FMA was not able to make contact with Client 1 to confirm the nature and extent of advice provided.

Alleged Code Standard Breach – Standard 12

- 18 Standard 12 of the Code requires an AFA to record in writing adequate information about personalised services provided to retail clients.
- 19 On the basis of paragraphs 14 to 16 above, B failed to comply with Standard 12.

Client 2

- 20 In August 2013, B conducted a review of Client 2's insurance policies. As a result of that review, B prepared a Personal Insurance Report, dated August 2013, in which B recommended that Client 2 increase their life and trauma cover, and cancel their TPD cover.
- 21 Subsequently Client 2's insurance policies were moved to another provider and their life insurance was rewritten.
- 22 At that time Client 2 held insurance under a workplace group plan life insurance policy. There is no documentation on B's files recording whether the cover under that policy was taken into account when assessing Client 2's needs.
- 23 During the FMA interview, B advised that Client 2 was considering leaving their place of employment such that the workplace cover was left in place as a result, however this position was not recorded in the documents on the file.
- 24 Accordingly, it was not possible to ascertain the adequacy of B's advice from the documents on file.

- 25 Despite attempts, the FMA was unable to contact Client 2 to confirm the nature of any advice provided in relation to the policy cover.

Alleged Code Standard Breach – Standard 12

- 26 Code Standard 12 requires an AFA to record in writing adequate information about personalised services provided to retail clients. It is noted that the Code in force at the times relevant to Client 2's file was the Code of Professional Conduct for Authorised Financial Advisers 2010 (the **2010 code**).¹
- 27 On the basis of paragraph 22 and 23 above, B failed to comply with Standard 12.

Client 3

- 28 B conducted a review of Client 3's insurance policies in July 2013. Following this review, B prepared an SOA recommending that Client 3 take out \$40,000 trauma cover with another provider. B provided Client 3 a price comparison for trauma cover at \$50,000, \$42,000 and \$40,000, with four providers.
- 29 At a meeting with B in August 2013, Client 3 advised B that they did not wish to pay more for their cover than they were paying at the time. This discussion is recorded in a filenote dated 8 August 2013, on B's file. As a result of Client 3's concerns regarding the level of their premiums trauma cover was reduced to \$30,000.
- 30 While Client 3's concern with price is recorded in the filenote, and was further confirmed by B during the FMA interview, the documentation on B's file does not demonstrate whether the level of cover obtained for Client 3 met Client 3's needs.
- 31 Also the file did not contain the following documentation:
- a A comparison of the material terms of the different covers quoted; and
 - b Any explanation of the risks of changing provider.
- 32 Despite attempts, the FMA was not able to make contact with Client 3 to confirm the nature and extent of advice provided.

Alleged Code Standard Breach – Standard 12

- 33 Standard 12 of the Code requires an AFA to record in writing adequate information about personalised services provided to retail clients. It is noted that the Code in force at the times relevant to Client 3's file was the 2010 Code.
- 34 On the basis of paragraphs 30 and 31 above, B failed to comply with Standard 12.

¹ The 2010 Code was in force from 1 December 2010 to 1 May 2014. The relevant Standards from the 2010 Code are set out in the Schedule to this Summary of Facts.

Client 4

- 35 B conducted a review of Client 4's cover in January 2014. From this review, B prepared a Personal Needs Analysis, identifying that Client 4 required \$130,000 life cover. At that time Client 4 held \$129,652 life cover with the QFE, with a 150% premium loading, costing \$183.97 per month.
- 36 At a meeting with B on 23 January 2014, Client 4 expressed concern about the level of their premiums. This discussion was recorded in a filenote on B's file.
- 37 B sourced life cover for Client 4 with another provider for a premium of \$107.82 per month, which Client 4 proceeded to take up.
- 38 When processing the application for the new life policy, B used an Execution Only process, under which the client provides an acknowledgement that no advice had been given by the adviser, and that the adviser's liability is limited, should there be any issue with the cover.
- 39 The file did not contain any documentation showing that B had explained to Client 4 why the Execution Only process was appropriate, or to inform them of the risks associated with this process.
- 40 In the interview with the QFE, B confirmed that there had been advice given in relation to the change of providers, such that the Execution Only process was not appropriate.
- 41 Despite attempts, the FMA was not able to contact Client 4 to confirm the nature and extent of advice provided or their understanding of the Execution Only process.
- 42 The documentation on the file is insufficient to confirm either that the Execution Only process was appropriate or that adequate advice was provided to Client 4 in relation to the change of insurance providers.

Alleged Code Standard Breach – Standard 12

- 43 Standard 12 of the Code requires an AFA to record in writing adequate information about personalised services provided to retail clients. It is noted that the Code in force at the times relevant to Client 4's file was the 2010 Code.
- 44 On the basis of paragraphs 38, 39, 40 and 42 above, B failed to comply with Standard 12.

Client 5(a) and Client 5(b)

- 45 As at November 2013, Client 5(a) held linked policies with the QFE, providing \$544,864 of life cover and \$544,864 TPD cover. Client 5(b) also held a life insurance policy with the QFE, providing \$544,864 cover.
- 46 B prepared a Personal Needs Analysis – Risk for Client 5(a) and (b), dated 14 November 2013 and subsequently a Personal Insurance Report dated 28

November 2013. B recommended that the clients obtain the following cover through another provider:

- a Client 5(a):
 - i \$400,000 of life cover;
 - ii \$100,000 of TPD cover; and
 - iii \$100,000 of trauma cover.
- b Client 5(b):
 - i \$400,000 of life cover; and
 - ii \$100,000 of trauma cover.

47 During the FMA interview, B advised that the other provider's life, trauma and TPD policy wordings were superior to the cover available through the QFE, specifically as the other provider's policy provided cover if Client 5(a) were unable to return to their "own occupation", rather than "any occupation". In addition, the replacement policies resulted in a reduction in premiums of \$14.40 per month.

48 However, while the file records advice provided in relation to changing providers, the documentation on file does not record the following:

- a Advice in relation to the reduction of the life cover held by the Clients;
- b A comparison of the key terms and benefits between the various policies; and
- c A comparison between the existing QFE policies, and QFE policies available, based on the lower levels of cover recommended.

49 Despite attempts, the FMA was unable to contact Clients 5(a) and (b) to confirm the nature and extent of the advice provided.

Alleged Code Standard Breach – Standard 12

50 Standard 12 of the Code requires an AFA to record in writing adequate information about personalised services provided to retail clients. It is noted that the Code in force at the times relevant to the Client 5(a) and (b)'s file was the 2010 Code.

51 On the basis of paragraph 48 above, B failed to comply with Standard 12.

Client 6(a) and Client 6(b)

52 As at January 2014, Clients 6(a) and Client 6(b) held life insurance for approximately \$650,000 cover each.

- 53 On 10 February 2014, B provided Client 6(a) and Client 6(b) with a Personal Needs Analysis, dated 27 January 2014, recommending that both clients needed \$390,000 of life cover and \$30-40,000 of trauma cover. A filenote on B's file records that the motivation to change was the ending of 5-year stepped life covers.
- 54 On 11 February 2014 B provided quotes to the clients by email for life cover at three different values (\$350,000, \$400,000, and \$500,000) from four different providers and trauma cover at two different values (\$30,000 and \$50,000) from the same four providers.
- 55 The same day Client 6(b) responded by email that they would go with one provider for life cover (\$500,000 for Client 6(a) and \$400,000 for Client 6(b)) and with another provider for trauma cover for Client 6(b) at \$30,000.
- 56 B met with the clients again on 17 February 2014. B's filenote of that meeting recorded that the clients had decided that:
- a Client 6(a) required \$500,000 of life cover, but did not require trauma cover; and
 - b Client 6(b) required \$400,000 of life cover and \$30,000 of trauma cover.
- 57 The filenote further records that the clients were interested in the cheapest provider and that B prepared the relevant paperwork, but that "*no advice was given*".
- 58 When processing the application for the new policies, B used an Execution Only process, under which the client provides an acknowledgement that no advice had been given by the adviser, and that the adviser's liability is limited, should there be any issue with the cover.
- 59 The FMA interviewed both Client 6(a) and Client 6(b) in relation to the replacement transaction. While Client 6(b) could not recall the details of the transaction, Client 6(a) confirmed that the clients had instigated the replacement transaction, motivated by a desire to reduce their premiums while maintaining a similar level of cover.
- 60 Client 6(a) further confirmed that the clients would have done some research before speaking to B, but that they would not have directed B as to how to proceed without receiving B's advice.
- 61 Client 6(a) advised the FMA that B had looked at options for them and had provided advice in relation to those options. On that basis Client 6(a) was of the view that B had provided advice on the replacement transaction.
- 62 B's file does not record advice given in relation to the nature and effect of the Execution Only process. While the clients signed an acknowledgement in relation to the Execution Only process, there is nothing on the file to demonstrate that they were informed as to why the process was appropriate,

including advice as to any risks to the clients which might arise due to the use of the Execution Only process.

- 63 In addition, the file does not contain a comparison of the material differences between the policies presented by B to the clients.

Alleged Code Standard Breach – Standard 8

- 64 Standard 8 of the Code requires AFAs to take reasonable steps to ensure that personalised services are suitable for clients. It is noted that the Code in force at the times relevant to the clients' file was the 2010 Code.

- 65 By adopting the Execution Only process, in circumstances where B had provided advice to the clients, B failed to take reasonable steps to ensure that the services provided were suitable in this regard. Accordingly, on the basis of paragraphs 52 to 54 above, B failed to comply with Standard 8.

Alleged Code Standard Breach – Standard 12

- 66 Standard 12 of the Code requires an AFA to record in writing adequate information about personalised services provided to retail clients.

- 67 On the basis of paragraphs 62 and 63 above, B failed to comply with Standard 12.

SCHEDULE

Code of Professional Conduct for Authorised Financial Advisers 2010

Code Standard 8

When providing a personalised service to a retail client an Authorised Financial Adviser must take reasonable steps to ensure that the personalised service is suitable for the client.

*An AFA is only required to determine suitability under this **Code Standard** based on the information provided by the client and information otherwise known to the AFA. However, an AFA must make reasonable enquiries to ensure the AFA has an up-to-date understanding of the client's financial situation, financial needs, financial goals, and tolerance for risk, having regard to the nature of the personalised service being provided.*

Where a client:

- (a) declines to provide some or all of the information required under this **Code Standard**, an AFA must take reasonable steps to ensure the client is aware that the personalised service is limited and specify those limitations; or*
- (b) instructs an AFA (or an AFA's employer or principal) not to determine the suitability of the financial adviser service provided, the AFA is relieved from the obligation to determine suitability to the extent provided for in that instruction. However, this relief is only available if the instruction is provided in a document that is signed and dated by the client, and that includes a clear acknowledgement from the client as to the advantages of the AFA determining suitability based on the provision of all the information contemplated under this **Code Standard**.*

*An AFA must not direct or influence a client to instruct the AFA not to determine the suitability of a financial adviser service to be provided for the client, or direct or influence a client to decline to provide any of the information contemplated under this **Code Standard**. However, this restriction does not prevent an AFA:*

- i drawing the client's attention to the client's ability to opt out of having suitability determined as contemplated under this **Code Standard**; or*
- ii quoting or estimating a reasonable fee for determining suitability under this **Code Standard**.*

*If the extent of an instruction given by a client under paragraph (b) of this **Code Standard** is such that the financial adviser service provided by the AFA*

to the client is not or will no longer be a personalised service, the AFA will then need to comply with **Code Standard 10**.

Code Standard 12

An Authorised Financial Adviser must record in writing adequate information about any personalised services provided to a retail client.

*The information required to be recorded under this **Code Standard** in relation to each retail client must include:*

- (a) information about:*
 - (i) any personalised service provided or any financial product recommended to the client; and*
 - (ii) any required explanation, and advice as to suitability, given to the client in relation to a financial adviser service or financial product; and*
 - (iii) the results of any enquiry or any oral confirmation from the client declining an explanation or suitability assessment under **Code Standards 8 and 9**; and*
- (b) copies of all information and documents provided to the client in writing, or received from the client, in connection with the AFA's personalised services including—*
 - (i) any information provided under **Code Standard 7**; and*
 - (ii) any provision or confirmation of financial advice; and*
 - (iii) any explanation provided in accordance with **Code Standard 9**; and*
 - (iv) any instructions from the client declining to provide information or declining an explanation under **Code Standards 8 or 9**; and*
 - (v) any instructions from the client declining or acknowledging any limitations of a suitability analysis in accordance with **Code Standard 8**; and*
 - (vi) details of any complaint received in relation to the AFA's services.*

*An AFA who is an employee may satisfy the AFA's obligations under this **Code Standard** by taking reasonable steps to ensure that relevant measures taken by the AFA's employer are consistent with the measures contemplated under this **Code Standard**.*

An AFA must comply with all obligations under the Privacy Act 1993. Without limitation, this includes obligations in relation to the use and disclosure of clients' personal information and the protection of that information from loss and unauthorised access, use, modification, or disclosure.