

FINANCIAL PLANNING ASSOCIATION CONDUCT REVIEW COMMISSION.

Member's Name: Dianne Margaret Bainbridge

Date of Determination: 6 November 2018

Member's ID Number: 339765

Licensee: Securitor Financial Group Ltd

Member's Firm: Gold Financial Services.

Introduction.

1. At all material times M/s D Bainbridge (the Member) was and is a Financial Planner and is the Managing Partner of Gold Financial Services Pty Ltd which is an authorized Representative of Securitor Financial Group Ltd (Securitor). The Member has been a member of the FPA since 2 June 2016. As such she is bound the Constitution of the FPA and is subject to the FPA Code of Professional Conduct and the FPA Disciplinary Regulations (DRs).
2. A complaint has been lodged with the FPA a client (the Client) of the Member concerning financial advice the Member provided. The circumstances surrounding the complaint have a lengthy history dating from 2015 at a time when the Member had not joined the FPA. While in its decision the Panel has found it necessary to refer to aspects of this history the FPA and hence the Panel has no jurisdiction to consider any alleged breaches which occurred in the period prior to the Member joining the FPA. The issue before the Panel concerns the circumstances surrounding the fabrication of the Client's signature appended to two documents generated from within the Member's office connected to a complaint made by the Client to the Financial Ombudsman Service (FOS).
3. It is alleged in that, in the alternative, the Member breached the FPA-

- (a) Code of Ethics Principle 2 in that she did not provide professional service with integrity,
 - (b) Professional Conduct Rule 7.2 by engaging in an act of misleading or deceptive nature which is likely to mislead or deceive,
 - (c) Professional Rule 7.31 in that she did not provide reasonable supervision of a subordinate to whom the Member assigned responsibility for a professional service.
4. The Panel had a folder of documents collated by the FPA Investigating officer which are referred to by the Tab numbers along with the record of interviews the FPA Investigation officer had with the Client, [a delegate of the client (the delegate)], and the Member. Additionally arising from an earlier held Directions hearing the Panel had a statutory declaration and a submission lodged by the Member. Also before the Panel was a copy of a report dated 21 August 2017 of the outcome of an investigation made by Securitor (the Securitor report) into a complaint lodged made by the delegate of the Client. The Panel also had an SOA dated 19 June 2017 provided to the Client by the Member.
- The Member agreed to the hearing being conducted on the papers subject to the Panel reserving the option of asking questions of her by telephone. The Member answered questions asked by Panel in a recorded telephone hearing held on 25 October 2018.

Background, Facts and the Member's Submission

5. On 23 October 2015 the Member provided financial advice via an SOA to the Client. In addition to providing financial advice the SOA recommended that the Client accept and pay for ongoing advice from the Member. On the same day the Client signed a document entitled "Authority to Proceed". The delegate was at the time a friend of the Member. The Member described their relationship as being 'close' and extending to both ongoing social and former working capacities. The Member, while she met and obtained instructions from the Client on three occasions, also described

the delegate as being 'the driver of engagement' ¹ between herself and the Client. The Client directed the Member to address any outstanding issues connected to the advice to be conducted through the delegate².

6. The Member claims that she was instructed by the delegate not to implement the recommendations contained in the SOA to invest the client's funds as the Client had become concerned about the economy. The instruction was given orally. The Member recorded file notes of the conversations with the delegate occurring between 23 October 2015 and 1 December 2016. In her oral evidence to the Panel the Member said that some of the conversations about the client's circumstances occurred at social functions and that when this happened the Member made a note of these conversations in a notebook.
7. A relevant file note made by the Member and dated 1 May 2017 records a meeting between the Member and the Client and the delegate which the Member maintains occurred on 15 May 2017³. The Member told the Panel that the appointment must have been made on the 1 May at which time she opened the file note. The file note mistakenly recorded that the meeting occurred on 16 May whereas the Member maintained to the Panel that the meeting was held on 15 May. Curiously the file note is endorsed as being "Last Modified" on 22 June. The Member said that 22 June would have been the day on which she completed the note and printed it so that it could be placed on the Client's paper file. The note records the Member discussing an update on the initial SOA which had been provided to the Client on 15 October 2015.
8. Both from the interview note taken by the FPA Investigation officer and as is apparent from reading the Securitator report the Client and her delegate claim that the Member was instructed to implement the advice provided in the SOA of 15 October 2015. On the other hand the Member claims to have been instructed not to implement the advice as the Client had become concerned over the state of the economy and wanted her funds retained in cash. This dispute was the subject of a

¹ Tab10 page 1

² Interview with the FPA Investigations officer 16 May 2018.

³ tab11.

complaint investigated by Securitator and subsequently the basis of a proceeding before FOS. While both of those proceedings found in favour of the Member the substance of that dispute is not a matter which, for the reason expressed earlier, this Panel is able to consider. As it may be reflective of credibility it is relevant that the Client and the delegate deny that there was any meeting with the Member at any time in May 2017. The Complainant provided a statutory declaration made 10 July 2018 that no meeting or discussion was held with the Member in May 2017⁴. The Client and the delegate confirmed that no meeting occurred in their interview with the FPA Investigation Officer⁵

9. On 29 November 2017 the delegate lodged a complaint against the Member with the FPA alleging that the Member falsified two of the documents filed with FOS by fabricating the Client's signature on those documents. In the complaint it is alleged that the Client's signature appended to a Risk Profiler questionnaire and to a Tax file consent form both dated 15 May 2017 was fabricated. It is claimed that the alleged fabrications are copies of the client's signature appended to the Authority to Proceed document which the Client signed on 15 October 2015.
10. The Member concedes that the fabricated signatures are identical to that appended to the Authority to Proceed document and admits that the fabrication has occurred. However in her interview with the FPA Investigation officer, and as subsequently confirmed in her statutory declaration, the Member denied that she fabricated the signatures. The Member claims that this was carried out by a staff member of her firm and that she neither directed nor authorized the fabrication. The Member claims that she asked the staff member to assist in compiling the documents to be forwarded to Securitator so that the licensee could investigate and respond to the initial complaint lodged by the Client. The documents were to be scanned from the paper file onto a computer file and then forwarded to Securitator. The Member maintains:

⁴ Tab14

⁵ Tab13 page 2

“I did not open each document individually to check the content, I simply selected each document based on the name and forwarded them on to the Securitor legal team.”⁶

11. In an email from the Member to the FPA Investigations officer dated 20 June 2018 the Member acknowledged that she is ‘...ultimately responsible for the files under her control’. Despite this the Member submits as follows:

“I am comfortable with my decision not to check each document individually, as the [staff member] was a qualified financial planner, who had previously managed a financial planning practice for some 10 years.... As such my expectation was that she had the capabilities to undertake the documentation compilation without additional supervision.”

The Member maintains that the documents on which the fabricated signatures appear were not required to make the files compliant.⁷

12. The staff member who the Member claims was the person responsible for the fabrication is no longer employed in the Member’s firm. The staff member was initially employed by the Member’s firm following a business merger occurring in December 2015. At the time of the merger two staff members from the merged firm joined the Member’s firm as part of the merger arrangements. The Member maintains that the staff member demonstrated “limited ability with general financial planning operations, having limited experience in mainstream planning”⁸. The Member told the Panel that she had a compliance meeting with the staff member each week and that she was monitoring the work of the staff member. The Member also told the Panel that the staff member’s employment was terminated by mutual agreement in January 2018 because of the staff member’s acknowledged shortcomings. The Member claimed in email correspondence

⁶ submission to the Panel

⁷ Interview with the FPA Investigation officer answer in point 13 of Tab 10 and confirmed in an email dated 20 June 2018 to from the member to the FPA investigation officer at Tab 13

⁸ submission page 2

with the FPA Investigation officer that she no longer had any contact with that former staff member⁹ .

13. The Member told the Panel that three audits carried out by the licensee, the first of which was in December 2016, had resulted in exposing failures in back office documentation including documentation not being completed on time and problems associated with the recording of dates on documents. The Member ascribed the shortcomings as being failings on the part of the former staff member. In approximately October 2017 the Member had the authorized representative status of the former staff member revoked. In her submission the Member stated that a remedial program was commenced to address the audit failures.
14. As is apparent from the above description of events the previously friendly relationship between the Member and the delegate have broken down.

Panel Consideration

15. The Member accepts that the two documents the subject of this proceeding were fabricated. However the Panel is reasonably satisfied that it was not the Member who attached the fabricated signatures to the two documents. The Panel is also reasonably satisfied from the evidence that the Member did not instruct or condone that action. In the absence of evidence of the former staff member, and not having any ability to question her, the Panel is unable to determine whether or not she may have been responsible for the fabrication. The Panel is additionally reasonably satisfied that the Member did not become aware of the fabrication until after the fact was drawn to her attention sometime after the complaint had been lodged with FOS.
16. While the Client and her delegate deny that there was any meeting or discussions held with the Member in May 2017 a file note, while unusually dated marked, supports a meeting and discussion as taking place. Somewhat curiously while the file note does not disclose any discussion or request at the

⁹ email 20 June 2018 tab 12

meeting being made for the Member to provide a risk profiler and SOA update these documents were prepared. On the material before it the Panel is unable to determine to its reasonable satisfaction whether or not a meeting took place at or about that time.

17. The Member claims only to have become aware of the failings of the former staff member at or about the time the client lodged the complaint with Securitator which occurred prior to the complaint being lodged with FOS. At that time the former staff member had been working in the Member's practice for in excess of 18 months. With only a small staff the Member must be taken to have been aware if there were shortcomings in her back of office procedures as was subsequently found in the audits. Additionally the Member was aware that the former staff member had limited general experience in financial planning –her previous experience being confined to financial advice connected with gearing. While weekly compliance meeting may have been held and a remedial program commenced the Panel is satisfied that these measures did not lead to a performance improvement.
18. In circumstances where the principal of a financial planning firm is aware of a staff member having limitations and where this is evident from a compliance failure revealed in a compliance audit processes it is to be expected that the principal would take steps to ensure that documentation prepared in response to a complaint was carefully scrutinized. Having regard to the circumstances the Panel does not accept that checking the names on the documents demonstrates a satisfactory level of scrutiny.
19. While the Member asserts that the fabrication of the two documents was not essential to achieving compliance this is not to the point. The fabrication of any documents –whether in response to a complaint or otherwise- in a financial planner's office is unacceptable and antithetic to the ethics by which members of the FPA have determined to operate.
20. In the Panel's view there is an inherent inconsistency in the Member's assertion that while she accepts that she is responsible for the files under her control she does not accept

responsibility for the fabrication of the documents. Responding to complaints forms a part of the provision of the professional service provided by a financial planning firm.

Given the background awareness that the Member had of the limitations of the former staff member the Panel is satisfied that the Member did not provide reasonable and prudent supervision of the staff member in that she failed to properly check the preparation of documentation submitted in response to the complaint made by the Client initially to the licensee and subsequently to FOS.

21. The Panel does not accept that the Member's awareness of the former staff member's capabilities only became apparent after the complaint was lodged. The Member had been the managing partner since her business merger with another practice in December 2015 and while she claims only to have been aware of the former staff member's limitations from December 2016 as managing partner she had a responsibility to ensure that employees were properly qualified to carry out their roles and where deficiencies were apparent these were properly supervised. The admitted facts leave the Panel satisfied that the Member did not discharge this responsibility and consequently the Panel is reasonably satisfied that a breach of Professional Conduct Rule 7.31 has been proven.
22. There is no evidence which suggests that the Member was in any way involved in the fabrication of the signatures or that she condoned the fabrication. Nor is there evidence which supports the Member engaging in conduct likely to be misleading, deceptive or dishonest. Consequently the Panel dismisses the alleged breaches of FPA Code of Ethics Principle 2 and Professional Conduct Rule 7.2.
23. Pursuant to Disciplinary Regulation 110 the Member has 21 days from the receipt of this decision in which to request a review. Pursuant to Regulation 106 the Panel determines that the Member is to pay the FPA's costs and expenses incurred in the Investigation and in undertaking this Disciplinary proceeding.

Financial Planning Association of Australia

Conduct Review Commission Disciplinary Panel

Sanctions Decision

Member: M/s Dianne Bainbridge

Member ID: 339765

Panel: Chair: Graham McDonald
Members: Petra Churcher CFP
Ranghild Sky CFP

FPA Complaint: FY17/18-09

Date of Decision: 14 December 2018

Background

1. On 6 November 2018 the FPA Disciplinary Panel determined that the Member had breached Professional Conduct Rule 7.31 in that the Member failed to provide reasonable and prudent supervision of, or direction to, a subordinate to whom the Member assigned responsibility for the preparation of documents to answer a complaint lodged on behalf of one of the Member's clients. The Panel dismissed allegations, arising from the same set of circumstances, that the Member failed to provide professional services with integrity contrary to the FPA Code of Ethics Principle 2 and/or that the Member engaged in misleading or deceptive conduct contrary to Professional Conduct Rule 7.2.

The Facts.

2. The Member conceded that two documents issued from her practice to the Financial Ombudsman Service (FOS), in response to a complaint lodged on behalf of a client, had been fabricated. The Panel accepted from a statutory declaration made by the Member that she was not the person who fabricated the documents or that she engaged in conduct which was misleading or deceptive in the preparation of the submitted documents. The Member claimed that the documents were fabricated by a staff member in the Member's office without the knowledge or involvement of the Member. However the Member had, and accepted that she had, responsibility for the actions of her staff.

3. The documents concerned were part of the material submitted to FOS in answer to a claim for compensation made against the Member on behalf of a client. The claim related to an alleged failure to invest money in accordance with instructions to do so following recommendations made in an SOA prepared by the Member. While the Member told the Panel that she did not check each document submitted she claimed that she was 'comfortable' to rely on the staff member concerned who she told the Panel had been a qualified planner. The

Member claimed to have expected the staff member, who had in the past managed a financial planning business for 10 years, had the capabilities required to undertake the compilation of the documentation.

4. At about the time the complaint the subject of the FOS proceeding was made the Member said that she concluded that the staff member concerned had limited ability and was not performing her duties to the standard which the Member expected. The Member told the Panel that three compliance audits had resulted in failures of “back office processes not being adhere to”.¹ This was the area of the practice in which the staff member worked. By mutual agreement the staff member left the Member’s practice in January 2018.

5. While the Panel accept that the Member has not knowingly breached her obligations under the FPA Code of Conduct, it regards the breach as being serious. First such action occurring has the obvious result of potentially misleading the assessment of the FOS claim. While the Member is satisfied that it did not occur the potential that it may reflects adversely on not only the Member’s practice vis a vis the client but stands to bring the profession into disrepute. Even where there is no detriment to a client established such conduct is the antithesis of the conduct expected of financial planners in their dealings with the public. It brings into question the public confidence as to how the profession is discharging its professional obligations.

The FPA Submission on the Appropriate Sanction to be Imposed.

6. The FPA submit that an appropriate sanction is suspension of the Member from the Association for a period of six months, with readmission dependent on the Member successfully completing an educational course in management and risk management in Financial Planning, such course to be approved by the Chair of the CRC, a written apology to the Complainant including an acknowledgement that the documents concerned were fabricated along with the possibility of a fine based on conduct which should not be considered to be a minor instance of unsatisfactory conduct (ie a fine of between \$5000 and \$20,000).² The Member has indicated that she is proposing to exit the profession upon the sale of her practice. If this is so the FPA submit that she should be obligated to provide a warranty to confirm that as being the case.

The Member’s Submission on Sanction.

7. The Member submits that dealing with the complaint has been time consuming and stressful which has resulted in her suffering on going health related problems. She submits that a reprimand or suspension of her rights and privileges as a Member of the FPA for a 3 month period would be an appropriate sanction to be imposed. In a subsequently submitted email the Member referred to sanctions which had been imposed in two earlier reported cases and

¹ submission dated 10 October 2018

² Clause 5 of Schedule B to the Disciplinary Regulations.

submitted that the sanctions recommended by the FPA were excessive having regard to the circumstances pertaining to her case.

The Applicable Principles Applying to the Imposition of Sanctions.

8. The purpose of having a Code is to publicly commit to a set of professional standards to which FPA members have agreed to adhere. All FPA members have agreed to abide by the standards and all have a direct interest in ensuring that the standards are maintained. It should be noted that while not relevant to the circumstances arising in the instant case that the provisions of the Code operate in addition to any legal requirements and do not replace the need for compliance with the law. Important aspects associated with having a code include:

- to inform the public of the standards which they can expect members will abide by when providing financial advice and services associated with the provision of that advice, including extending to dealing with complaints, and,

- to protect the public from misconduct, malpractice and other conduct which falls short of that set out in the Code. In this case the circumstances of the professional supervision of the conduct of a staff member falls short of that which could reasonably be expected, and,

- to promote the members as providing a professionally based financial planning service, including as the FPA in its submission notes, protecting FPA peer members from being brought into disrepute.

9. So that the Code is not limited to being aspirational in nature enforcement mechanisms are needed to ensure compliance with the Code's provisions. Alleged breaches of the Code are investigated by the FPA professional standards division and can arise from complaints emanating from clients, other planners or from independent investigations initiated by the Association. Alleged breaches are determined by peer review carried out by senior and experienced FPA members chosen by the Association board under the guidance of an independent non industry based chairperson.

10. The overwhelming purpose of both the Code and Disciplinary procedures, where a breach has been established, is to ensure that the public are protected from misconduct or malpractice by FPA members. The disciplinary procedures are not designed to punish members but are to be regarded by members as fulfilling a protective function-that is primarily to ensure the protection of the public and at the same time to protect and inform the balance of the FPA membership of conduct considered to be unacceptable under the Code. It is in the public interest, as well as in the interests of all FPA members, to ensure that the standards of conduct to which they have committed are properly and fairly assessed. If an alleged breach is substantiated any sanctions determined should reflect a balance between the seriousness of the circumstances giving rise to the breach and take into account any remedial action which may assist the member in improving the standards operating in his/her practice.

The Sanctions.

11. The Panel has carefully considered the circumstances in this case. While it notes that a previously existing personal and business relationship between the delegate of the complainant, who acted on behalf of the complainant in initiating the complaint, and the Member has broken down, that is not a factor which should, or has, influenced the Panel's assessment of the circumstances surrounding the conduct which resulted in the breach. Neither does it play any part in the Panel's decision on the sanction to be imposed. While the Panel noted the Member's references to sanctions imposed in earlier CRC decided cases the Panel decided that this information was of limited value in current circumstances. A greater degree of professionalism in the provision of services connected with the giving of financial advice is now expected-not only by the public but also within the industry as it transitions to be a profession.

12. The Panel has taken into account that the Member has at all times cooperated with the FPA investigation team and with the Panel in relation to this proceeding. In particular the Member conceded that the fabrication had occurred early in the proceeding saving costs associated with having a forensic examination undertaken and a report obtained. The Panel has already directed that the Member pay the costs associated with the proceeding which are to be determined by the FPA.

13. The range of sanctions applicable are set out in Schedule B to the FPA Disciplinary Regulations. Proper and adequate supervision of staff is an important and integral part of a financial planner's professional business wherever it is located. Bearing all factors in mind and having regard to the fact that it was not the Member who undertook, or sanctioned, the fabrication, the Panel has decided that the imposition of a fine is not warranted. However given, for reasons earlier expressed, that the Panel regards the breach as being serious it is appropriate to impose a suspension of rights and privileges of the FPA for a period of 6 months, with the Member being directed during that period to undertake a remedial training course in Management and Risk Management at her cost, the course to be determined by the FPA Professional Standards Team.

14. Additionally during the period of the suspension the Member is to certify that all documents pertaining to each file have been reviewed and approved by her. The certification, in a form approved by the FPA Professional Standards Team, is to be placed at the front of each file and is to be completed for inspection by an FPA officer by no later than the fifth month of the suspension period. The FPA to undertake a compliance review (audit), at the cost of the Member, prior to the expiration of the suspension period to ensure that the Member has fulfilled this requirement. Should the Member sell her practice during the 6 month suspension period she is to notify the FPA and the proposed audit is to be undertaken in the month leading up to the sale of the business occurring.