IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

Case Number: FAIS 07240/11-12/ KZN 1

In the matter between

DALE ANSON HANCOCK	**First Complainant**
TIFFINY-ANN HANCOCK	**Second Complainant**

and

CRAIG WRIGHT FINANCIAL PLANNERS CC	**First Respondent**
CRAIG WRIGHT	**Second Respondent**

DETERMINATION IN TERMS OF SECTION 28 (1) OF THE FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT 37 OF 2002 ('FAIS ACT')

A. INTRODUCTION

[1] In 2010, the first and second complainant collectively invested R560 000 into property syndication schemes promoted by PIC Syndications (Pty) Ltd, on the advice of the second respondent. The complainants concluded a total of five (5) investments into Highveld Syndication 21 and Highveld Syndication 22, with each complainant investing a total of R280 000. While the investments were positioned to the complainants as being secure and guaranteed, the investments failed not long after they were concluded.

[2] The complainants were initially advised that the investment period would be three to six years and that they would, in respect of the investments into Highveld Syndication 21, receive an income for the duration of the investment. This however proved to be untrue, with the complainants only receiving a portion of the marketed income during

the investment period. The complainants are still awaiting receipt of their invested capital even though, according to the information provided to the complainants, the investment period should have ended two years ago.

[3] The complainants thus claim that they have lost the money invested into the syndications. They attribute this loss to an alleged failure by the second respond to conduct due diligence before recommending the product to them.

[4] The delays in finalizing this complaint have been discussed at length in previous determinations issued by this Office concerning property syndication complaints. It is therefore unnecessary to again canvass these reasons in this determination. These determinations can be accessed from this Office's website.

B. THE PARTIES

[5] The first complainant is Mr Dale Anson Hancock, an adult male. The second complainant is Mrs Tiffiny-Ann Hancock, an adult female. Their particulars are on record with this Office.

[6] The first and second complainant are married to each other and the investments that form the subject of this complaint were funded from a joint savings account.

[7] The first respondent is Craig Wright Financial Planners CC, a close corporation duly incorporated in terms of South African law, with registration number 2006/197505/23. The address of the first respondent's principal place of business is noted in the records of the Financial Sector Conduct Authority (FSCA) as 102 Northway, Durban North, Kwazulu-Natal, 3610. The first respondent was previously registered as an authorised financial services provider (FSP) (licence number 33276) from 2007, but its license lapsed on 27 August 2014.

[8] The second respondent is Craig Wright, an adult male key individual and representative of the first respondent. The second respondent's address is noted in the Regulator's records as 20 Canford Park, 53 Anthony Road, Umgeni Park, 4051. At all times material hereto, the second respondent rendered financial services to the complainant in his capacity as a representative of the first respondent.

[9] In this determination I refer to the respondents collectively as 'the respondent' and where appropriate I specify which respondent is being referred to.

C. THE COMPLAINT

[10] In August 2010, the complainants approached the respondent, who had been their financial services provider since 2006, to enquire about investments into the property syndication schemes marketed by the first respondent. The complainants' interest in the product was piqued when their retired parents, on advice of the second respondent, invested what the complainants have described as a substantial amount of their retirement savings, into these syndications. The complainants state that they assumed that the investments were 'appropriately low risk and of a safe investment nature', given the profile of their parents and the amount of money which their respective parents were prepared to invest in the products. On the strength of this, the complainants reached out to the respondent to gather some information on the product.

[11] The respondent proceeded to provide the complainants with more information regarding the product and arranged to meet with them. The complainants state that their intention when arranging to meet with the respondent was to discuss the investment and to potentially commit to it. This meeting took place on 6 September 2010.

[12] Prior to this meeting with the respondent, he sent the complainants an email in which he provided them with information on the main features of the product. In this email,

the respondent informed the complainants that he believed the investment to be a great one given, amongst others, that there were various buildings in each investment and that each of these were attracting various sectors of the rental market.

[13] The complainants claim that on meeting with the respondent, their first enquiry related to the safety of the investment, since the first complainant's sister had 'been stung by a recently failed property syndication fund in Gauteng'. The complainants allegedly asked the respondent about the possibility of the investment failing in a manner similar to said property syndication fund. They allege that in response, the respondent assured them that the product could not fail because it offered secure growth and capital preservation. The respondent, relying on the prospectus for Highveld Syndication No. 21 Ltd[1] (HS 21), only pointed out its positive features and informed them that the investment was guaranteed.

[14] Based on the information provided to them by the second respondent, especially that the investment was guaranteed, complainants allege that they were persuaded that the product accorded with their risk profile as well as their needs, personal circumstances and objectives. This, complainants' state, together with the long standing relationship that they had with the second respondent, moved them to commit to the investment.

[15] On 16 September 2010, the complainants invested R180 000 each in HS 21 and indicated to the second respondent that they would invest more money as it became available to them.

[16] True to their word, the complainants concluded two more investments on 18 September 2010. The investments were made into Highveld Syndication 22 (HS 22), with the first complainant investing R50 000 and the second complainant investing R100 000. On

[1] T/a Tyger Manor Syndication.

26 November 2010, the first complainant made another investment of R50 000 into HS 22, bringing the total collective investments made by the complainants to R560 000.

[17] The complainants allege that during their discussion with the second respondent on 6 September 2010, he assured them that the investment was safe and that they insisted that the second respondent record this in the pre-sale documents. This was in fact recorded in the investment proposals completed by the second respondent, which proposals also recorded the complainants' need, as well as the supposed features of the product that was recommended to them.

[18] The complainants argue that if the features of the product were in fact not as they were recorded by the second respondent, he had an opportunity to advise them of this but that he failed to do so. The complainants argue that the second respondent allowed them to proceed with the investments under the incorrect impression that it was a secured, protected and guaranteed.

[19] The complainants also argue that following the meeting of 6 September 2010, the further meetings which took place between them and the second respondent were 'mere formalities' to invest the remaining funds. It did not involve any further discussions or any further perusals of the appropriate prospectuses. They also claim that they had not, as at the date the complaint was lodged, received the full prospectus in respect of the HS 22 investment. They claim that they proceeded to invest in HS 22 because they accepted the respondent's advice that the investment was practically identical to the HS 21 investment. Save for the fact that it would not pay any income during the investment period, and that it would be pay out 200% of the capital invested on maturity of the investment.

D. RESPONDENT'S VERSION

[20] On receipt of the complaint, this Office, in accordance with Rule 6 (c) of the Rules on Proceedings of this Office, forwarded the complaint to the respondent on 22 February 2012 to afford the respondent an opportunity to either resolve the complaint with the complainants or to respond fully thereto.

[21] In his response, the respondent provided a detailed account of the days on which he met with the complainants before each investment was made. He further provided an outline of what was supposedly discussed during these meetings with the complainants, and also referred this Office to the application forms completed in respect of each of the investments. According to the respondent, they contained, 'full disclosures', the 'service level agreement', 'risk and needs analysis' and the 'record of advice'.

[22] After due consideration of this response, this Office found the respondent's response wanting and was not satisfied that the allegations raised by the complainants had been adequately addressed. Consequently, this Office accepted the matter for formal investigation and issued a notice in terms of section 27 (4) of the FAIS Act, which it sent to the respondent. In this notice, the respondent was advised that his response, as well as the documentation he submitted, where insufficient to demonstrate his compliance with the FAIS Act and the General Code of Conduct for Authorised Financial Services Providers and Representatives (the Code).

[23] The respondent was also advised that the matter had been accepted for formal investigation and was referred to various sections in the FAIS Act and the Code which this Office perceived he had breached or failed to comply with. On account of these perceived breaches, this Office recommended that the second respondent make an offer to the complainants that is fair and reasonable, in settlement of the complaint.

[24] The respondent was further advised that in the event that he failed and / or refused to do so, the complaint would be resolved by way of a determination. The respondent was also afforded, in place of settling the matter with the complainants, the opportunity to respond to the allegations raised against him and was again called on to submit the information and supporting documentation necessary to demonstrate his alleged compliance with the applicable legislation.

[25] In response to this notice, the respondent, on 29 October 2010, alleged that the information he provided to the complainants was true and correct at the time the financial service was rendered to them. The respondent stated that due to circumstances beyond his control, these terms and conditions were changed by the product provider. The second respondent further alleged that the first complainant had domestic properties, as part of an investment portfolio he managed himself, and was thus well informed on the various investment options in the market place and the risks associated with them all. He also alleged that all of these risks, pertaining to the particular investments, had been discussed in detail.

[26] Finally, the respondent referred this Office to specific clauses in the documents that concerned the investments which he alleged evidenced his compliance with the FAIS Act. Among these documents submitted by the second respondent, was the brochure compiled in respect of the product offering. The respondent indicated to this Office that this brochure, together with the prospectus for HS 21 was sent to the complainants when they enquired about the investment. It was also discussed with the complainants before the application forms were completed.

E. INVESTIGATION OF THE COMPLAINT

[27] Having considered all the responses from the respondent (which were largely repetitive and to which the same documents were repeatedly attached), this Office was of the

view that it failed to rebut the complainants' allegations. This much was communicated to the second respondent in three other notices sent to him on 2 July 2016, 19 September 2017 and 19 February 2018.

[28] There is no record that the second respondent responded to these latter notices. Having forewarned the respondent of the consequences of not responding, the Office concluded its investigation.

F. DETERMINATION

[29] The defences raised by the respondent are the following:

29.1 that the complainants approached him to request information on the product;

29.2 that the complainants were provided with a copy of, at least, the prospectus for Highveld Syndication 21 and the brochure received from the marketer;

29.3 that he viewed and discussed both the prospectuses and the brochure with the complainants before the application forms were completed.

[30] It appears therefore that the respondent's defence is that the complainants had, at their disposal, all the information required to make an informed decision prior to the investment. It was not his advice that led them to invest in either of the property syndications. Onn this basis, the respondent believes that he should not be held liable for the loss suffered by the complainants. In this determination, I will consider whether this defence, given the facts, is valid.

Merits of the complaint

[31] It is not in dispute that the respondent rendered a financial service to the complainants. The respondent was the one who provided the complainants with the information relative to the investment. It was after he met with the complainants that they decided to invest as they did. The complainants stated that they do not believe that the respondent conducted his due diligence in researching the claims of the product. They

also claim that the second respondent did not recommend a product that was appropriate for their known conservative risk profiles. Notably, the respondent has not denied this. Instead, the respondent has referred this Office to how the complainants, at the time, had 'diversified their portfolios into domestic property', and to the fact that he provided them with a copy of 'the' prospectus, which he discussed with them.

[32] However, given the fact that the complainants, in the application forms completed for each of the investments, indicated that they were looking for an investment that would provide them with 'guaranteed capital growth' and 'capital preservation', it is unclear how this information from the respondent is relevant as a response to the complaint.

[33] The respondent has not mentioned in any of his responses, the needs of the complainants at the time the risk analysis was conducted and why, on the basis of the results from this analysis, he found the investment in question to be suitable to the complainants. The respondent has only ever referred this Office to the fact that the risk and needs analysis was done, and to what was contained in the application form with no reference to how he relied on this information when he rendered the financial service to the complainants. This despite the duty placed on the respondent by sections 8 (1) (a) - (c) of the Code.

[34] Sections 8 (1) (a) - (c) of the Code state that:

"a provider, other than a direct marketer must, prior to providing a client with advice –

(a) take reasonable steps to seek from the client, appropriate and available information regarding the client's financial situation, financial product experience and objectives to enable the provider to provide the client with appropriate advice;

(b) conduct an analysis for purposes of the advice, based on the information obtained;

(c) identify the financial product or products that will be appropriate to the client's risk profile and financial needs subject to the limitations imposed on the provider under the Act, FAIS Act, or any contractual arrangement".

[35] Admittedly, it appears that the second respondent complied with sections 8 (1) (a) and (b) of the Code. This is evident from the information which appears in the pre-sale documents, including the application form. There is evidence that the respondent was aware of the complainant's financial situation, their financial experience and objectives and that he conducted an analysis for the purposes of the advice. It appears however that after collecting the information, he was required to analyse the said information. However, the second respondent failed to consider whether the investment in question was in fact suitable to the complainants. Instead, it seemed that the respondent was willing to accept that because the complainants had enquired about the investment in question, that it was enough for him to then recommend that particular product to them and not any other.

[36] What the respondent has not considered is that the complainants did not at all seem, at any stage prior to conclusion of any of the investments, to be married to the idea of investing in the product in question. If anything, the questions from the complainants prior to the investment show that the complainants were not interested in investing in the product in question, unless the product guaranteed, overall, the preservation and growth of their capital. To recommend the product then if it did not carry this guarantee, would in my view no doubt be a breach of the contract concluded between the parties.

[37] This principle was confirmed in the decision of the Financial Services Tribunal (the Tribunal) in the consolidated matters of *Optimum Consultants (Pty) Ltd and Another v Margaretha E Lambrechts N.O. and two Others*[2]. The Tribunal held that where an

[2] FAB2/2018 and FAB20/2017

instruction is given to an FSP to recommend a product that is guaranteed, that the recommendation of a product that is not guaranteed would amount to breach of contract and would render the product unsuitable to the client[3]. The complainants, as with those in the aforementioned matter, were clear about the product that they sought. The respondent represented to them that the product he was recommending matched their needs, except it is clear that it did not.

[38] That the complainants approached the second respondent to assist with an investment, did not absolve him of the duty imposed on him by the Code to consider whether the product was suitable or not. There is no evidence to suggest that the second respondent, each time he rendered the service to the complainants, advised and warned them of the risks inherent in the product in order, thus placing them in a position to make an informed decision. This duty he bore in terms of section 8 (2) of the Code. All the documentary evidence points to, and supports the complainants' version that they were advised that the product was safe and secure.

[39] In his rebuttal of these allegations and the evidence, the second respondent maintains that the complainants were provided with the brochure and prospectus, and they should have deduced from this material what the features of the product were. The second respondent says this even though he, their trusted financial services provider for at least four years at the time the investments in question were recommended, had assured them of its safety, in writing. I do not see what cause the complainants would have had to doubt these representations from the respondent. The respondent cannot successfully raise this as a defence.

[40] The respondents' argument is made without due regard to the fact that the FAIS Act places the responsibility to ensure that appropriate products are recommended to a

[3] At paragraph 36.

client on the financial services provider, given the skill a financial services provider professes to have, and should have, when rendering a financial service.

[41] In addition, the second respondent has also failed to note that the prospectus contravened Notice 459[4] to the Unfair Business Practices Act[5]. The money investors paid, while paid to a trust account and although the law demanded that it be withdrawn only in the event of registration and transfer of the property, was to be withdrawn before that to service a number of expenses. This is but one of the contraventions of Notice 459, yet the second respondent, seemingly because he accepted without any inquisition into or without testing the information he received from the promoter, accepted that the investment would in fact ensure a secure income and preservation of the complainant's money and presented this as fact to the complainants.

[42] It is an undisputed fact that the complainant's risk profile was conservative and that the complainant's were not willing to accept any high risks. The respondent however found it apt to recommend an investment that presented risks the complainants have maintained they were unwilling to accept. The respondent himself stated that he would not have advised the respondents to invest in PIC had it not been for the guarantees provided by the promoter. It is difficult to see then how the complainants themselves would not have been persuaded to invest in the product. For more about the PIC investments, I refer to the Tribunal's decision in the *Optimum* matter.

[43] Consequently, the respondent's advice that the investment was guaranteed 'lured the complainants to invest in the property syndications'[6]. In light of this and the afore going, I am persuaded by the complainants' arguments that the respondent failed to undertake a thorough assessment of the investment or do his due diligence to recommend an

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4 Published in 2006 in Government Gazette No 28690 published in 2006.

5 Act 71 of 1988.

6 Optimum Consultants (Pty) Ltd and Another v Margaretha E Lambrechts N.O. and two Others at paragraph 45.

appropriate product. The respondent thus failed to observe the duties imposed on him by the Code and the FAIS Act.

[44] On the facts before me, I find that the respondent contravened the following sections of the Code: Sections 2, section 3 (1) (a) (i) and (iii); section 7 (1) (a); sections 8 (1) and (2) in that the respondent did not:

44.1 Render financial services with the necessary skill, care and diligence required.

44.2 In providing financial advice, failed to provide the complainants with information that was factually correct.

44.3 Failed to provide information about the products that was adequate and appropriate.

44.4 Failed to ensure that the complainants understood the advice and that they were placed in a position to make an informed decision.

44.5 Failed to demonstrate that he understood and explained the content of the prospectus to the complainants, or that he was even aware of the contraventions of Notice 459 or the lack of governance within PIC Syndications.

[45] It follows then that the respondent factually caused the loss suffered by the complainants.

G. CAUSATION

[46] While the respondents' actions, through his breach of the Code, factually led to the complainant's loss, liability does not follow unless it can be shown that he also legally caused the loss.

[47] The Constitutional Court, in *Lee v Minister of Safety and Security*[7], reiterated the formulation of the test to establish legal causation as follows:

"The test—

"may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; [otherwise] it would not so have ensued. If the wrongful act is shown in this way not to be a causa sine qua non of the loss suffered, then no legal liability can arise".

[48] On an application of this test, we have to consider whether, if the respondent's actions are mentally removed, the relevant consequence would still have resulted[8].

[49] It is not in dispute that it was the first complainant who contacted the respondent requesting information on the investments, and that the initial meeting between the parties took place following the complainant's request. Even so, it appears plainly in the documentary evidence that the investment followed only after the respondent provided the complainants with incorrect and incomplete details regarding the investment. The complainants were assured that the investment accorded with their financial needs, objectives and risk profiles. On account of their long standing relationship with the second respondent, as well as the respondent's written assurances on the safety of the product, the complainants were evidently persuaded to commit to the investment. This much is also not in dispute. I am therefore satisfied that in the absence of the second respondent's conduct, the complainants would not have concluded the investments in question.

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7 2011 (6) SA 564 (WCC) at para 40.
8 *Ibid* at para 41.

[50] I conclude that the respondent's actions were the proximate cause of the complainant's loss.

H. THE ORDER

[51] In the instance, I make the following order:

1. The complaint is upheld.

2. The first and second respondent are ordered, jointly and severally, the one paying the other to be absolved, to pay to the first complainant the amount of R280 000, and to the second complainant, the amount of R280 000.

3. Interest on this amount at a rate of 10% per annum from the date of determination to date of final payment.

4. The complainants are to cede their rights and titles in respect of any further claims in respect of these investments to the respondents.

[52] Should any party be aggrieved with the decision, leave to appeal is granted in terms of section 28 (5) (b) (i), read with section 230 of the Financial Sector Regulation Act 9 of 2017.

DATED AT PRETORIA ON THIS THE 29th DAY OF MARCH 2019.

NARESH S TULSIE

OMBUD FOR FINANCIAL SERVICES PROVIDERS