IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS, PRETORIA

Case No. SM-FOC 3829-06-07

In the matter between:

MARYKE MAX	**First Complainant**
PETRUS MARX	**Second Complainant**

and

WAYNE ASHLEY GRAY	**First Respondent**
GARY HILTON GRAY	**Second Respondent**
QUANTUM LEAP FOREX 181 (PTY) LTD	**Third Respondent**

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

A. THE PARTIES

1. First complainant is Maryke Marx, a female physiotherapist who resides in Ceres, Western Cape.

2. Second complainant is Petrus Marx a male electrical engineer who resides in Ceres, Western Cape.

3. First respondent is Wayne Ashley Gray (Wayne), an adult male, an authorised financial services provider in his own right with FSP No. 16498. In terms of this license, 1st respondent may only render financial services in respect of long and short term insurance and health services benefits. 1st Respondent is also an authorised representative of the third respondent. It would appear that respondents interpreted the latter arrangement to mean that even though 1st respondent is not allowed to render financial services in relation to forex in terms of his own license, he is able to do so by virtue of being a representative of 3rd respondent. As will become apparent in the succeeding paragraph, 3rd respondent's license confines it to rendering intermediary services only and not advice. First respondent's address is 9 Clifford Road Chancliff Krugersdorp, Gauteng.

4. Second respondent is Gary Hilton Gray (Gary) an adult male who is also an authorised representative and key individual of the 3rd respondent. Second respondent's address is Plot 7 Clifford Road, Chancliff, Krugersdorp, Gauteng.

5. Third respondent is Quantum Leap Forex 181 (Pty) Ltd (Quantum Leap), a private company incorporated in terms of the laws of South Africa. Third respondent's license as a FSP lapsed in August 2009. Its principal place of business is situated at Plot 7 Clifford Road, Chancliff, Krugersdorp, Gauteng. Second Respondent is authorised to render only intermediary services in terms of its license. Third respondent is represented by Gary Gray (Gary), its authorised representative and key individual.

B. THE COMPLAINT

6. The complainants lost a substantial amount of their savings in an investment that was provided by third respondent. The investment was made on the recommendation of the respondents' financial advisor and broker, Wayne.

7. Wayne had a long relationship with the complainants as their financial advisor. It appears that Wayne was their financial advisor since 2000. In this capacity Wayne regularly called on the complainants to assess their financial needs and to review their portfolio.

8. In June 2004 Wayne called on first complainant (Maryke) for a routine visit to discuss the latter's financial requirements. During this visit Wayne pointed out that one of Maryke's Old Mutual policies was not performing well. It is here that Wayne introduced Maryke to what he described as "a wonderful forex investment". He promised that this investment will provide a return of 3% per month.

9. Wayne informed Maryke that the investment will be done through a "registered" investment company called Reymount Investment Ltd (Reymount). Wayne explained that this was a "dollar based scheme" in Forex markets. According to Maryke, Wayne used a "simple organogram" to explain the relationship between the investor, Quantum Leap, Reymount and Burling Bank.

10. Wayne informed Maryke that the investment was "legal" and Quantum Leap was registered at the Financial Services Board (FSB). Wayne also pointed out that

"controls were in place" that will minimise risk and that the respondents could not lose more than 5% of their investment if things go wrong. Wayne also promised that the complainants will receive monthly statements indicating the status of their investment.

11. The complainants were persuaded and Maryke drew her funds out of the "non-performing" Old Mutual policy and invested in Quantum Leap.

12. On the 22nd October 2004 Maryke invested in Quantum Leap by depositing an amount of R66 843 – 00 into Burling Bank in Chicago. Wayne assisted her in making this deposit and he was paid R3000 – 00 as commission as a result of this transaction.
13. Maryke was happy with the investment as she received statements that showed a return of 3% per month even where, during some months, the company made losses.

14. In February 2005 the family's circumstances changed. Petrus Marx (Petrus) had work opportunities in Ceres in the Cape and wanted the family to relocate. This was not an easy decision as Maryke had to give up her practice and was unable to find employment in Ceres.

15. The complainants sold their house and decided to invest the proceeds. One of the options they considered was to pay the proceeds into the bond of their house in Ceres. In this regard Maryke consulted Wayne about the possibility of investing in Quantum Leap. Wayne strongly recommended such an investment and pointed out that Maryke could draw 2% of the profits as a salary and

reinvest 1%. Wayne also discouraged Maryke from paying the money into her new bond, pointing out that she will earn much more in Quantum Leap instead, as much as 3% per month.

16. On this advice the complainants made the decision to move to Ceres as Maryke will be able to draw on the Quantum Leap investment as an income.

17. On the 2nd June 2005 Petrus made an investment of R100 000 – 00 into Quantum Leap and Wayne was paid a commission of R1000 – 00. The money was deposited into an account in Burling Bank Chicago.

18. During or about August 2005 complainants were informed that deposits of investments had to be made into a Standard Charter Bank in Dubai. Wayne explained that our (the South African) government was discouraging investments going to the United States. This explanation was accepted by the complainants.

19. On the 9th August 2005 Maryke made a deposit of R560 000 – 00 into Quantum Leap. Wayne was paid a commission of R11200 – 00. That brought the total investment from the complainants to R726 843 – 00.

20. After relocating to Ceres, Maryke lived on income from her old practice and did not draw any money from the investment in Quantum Leap.
    After about three months, she started telephoning Wayne to see if she could draw money from the 3% per month return on her investment.

21. In August and September 2005 complainants received statements indicating that no profits had been made. The explanation was that no trading took place due to

market volatility brought on by such factors as the London bombings, soaring oil price, hurricane Katrina and China's role in global trading. This explanation was also accepted by the complainants.

22. In September 2005 complainants received a note from Quantum Leap to the effect that the latter was in a trade and could only allocate profits/losses once this trade had been closed. Complainants were also informed that due to volatility in the market, the company had "moved into bullion" which was slower in nature and required more patience. The complainants were further told that the company may have to hold this position till January 2006.

23. In February 2006 complainants received a letter from Quantum Leap telling investors that the price of gold unexpectedly spiked and they were forced to "lock our gold position" to avoid serious loss. The letter also informed the investors that this trade could take "quite a number of months to rectify and the nominal value of your investment will therefore only change once we have closed this gold position".

24. What this meant for Maryke was that there was no prospect of withdrawing any funds from the investment. The investment was not making a return of 3% per month but was incurring losses. At this stage Maryke spoke to another investor, Ian Scott, who informed her that he had several meetings with Wayne and Gary and that the losses were severe. Maryke become very worried as she and Petrus had invested virtually all the money they had in Quantum Leap.

25. On the 7th February 2006 Maryke flew to Johannesburg and met with Quantum Leap's "international trader" one Kiran Thiruvengadam (Kiran). At this meeting

Kiran informed Maryke that gold had spiked against them and that their investments had suffered major losses. Kiran offered Maryke the possibility of staying in the scheme for a longer period to try and recover the loss if the gold price came down.

26. A few days after meeting Kiran, Maryke had a lengthy meeting with Wayne and Gary. At this meeting Gary advised the complainants to withdraw what is left of the investment before a possible rise in the gold price could make things worse.

27. On the 21st June 2006 Maryke withdrew what was left of her investment in an amount of R69 742 – 24 thus leaving her with a loss of R557 100 – 76.

28. On the 13th July 2006 Petrus withdrew what was left of his investment in an amount of R18 630 – 72 thus leaving him with a loss of

    R81 369 – 00.

29. After the meeting with Gary and Wayne, Quantum Leap later suggested that once a new investment scheme had been set up with Saxo Bank in Denmark, all profits will be allocated to investors until losses are recovered. None of these promises materialised and Maryke decided to file a complaint with this Office.

30. Maryke believes that Wayne and Gary are responsible for their losses and are obliged to refund the loss. She supports her view by stating the following:

    30.1 They were misled about the high risk in this investment. Although Wayne mentioned that the investment was "speculative" he informed her that controls were in place and that if there was a loss it will not be more than 5% of the

investment. Maryke believed at the time that this was not such a high risk.

30.2 Maryke and Petrus were told that the investment was in the currency market and nothing was said about trading bullion.

30.3 The complainants were informed that the trader, Kiran, and the clearing house, Reymount, were registered with the FSB. This turned out to be untrue.

30.4 In July 2005 the FSB declined a licence application by Kerford, the employer of Kiran, and Reymount. Moreover the FSB warned against using the services of Reymount. Quantum Leap ignored these warnings and even accepted Maryke's second investment.

30.5 Wayne knew that the second investment represented Maryke's only source of income but nevertheless recommended a high risk investment with the involvement of unlicensed financial services providers. Maryke asks the pertinent question: "why would he still risk my money?"

30.6 Quantum Leap promised that the trades would be done "by a cautious trader". Yet the trader moved into bullion and lost the money.

30.7 Quantum Leap deliberately withheld information and kept investors in the dark over the losses being incurred. The monthly statements were misleading as it showed the nominal values and stated nothing about loss or profits. When investors found out about the losses, it was too late.

30.8 Gary and Wayne handled the investments "with wilful misconduct and grievous negligence".

31. The complaint in all its detail was referred to respondents in terms of section 27 (4) of the Act. Both Gary and Wayne responded in writing and explained why they and Quantum Leap should not be held liable for the complainant's loss. I will deal with the response below.

C. THE ISSUES

The following are the material issues to be decided in this determination:

32. Did the respondents comply with the FAIS Act whilst rendering financial services to complainant? In this regard, the following must be answered:

32.1 Whether respondents made the necessary disclosures to complainants to enable them to make informed decisions?

32.2 What action, if any did respondents' take after being advised not to deal with Kerford and/or Reymount by the regulator?

32.3 Whether respondents acted in the interests of complainants as required by the FAIS Act?

32.4 Whether the respondents rendered the financial service with due care, skill and diligence?

33. If it is found that respondents' actions violated the FAIS Act, then it must be established:

33.1 Whether respondents' conduct occasioned complainants' loss; and if so;

33.2 The quantum of such loss.

The Scott determination

34. For purposes of this determination I make reference to the determination in the case of Ian George Buchanan Scott v Wayne Ashley Gray and Quantum Leap case no FOC 3617/06-07/GP (the Scott case). The investment in the Scott case is the same as in this case and the respondents are also the same as in this case.
35. In addition I refer to the decision of the Board of Appeal, dated 4th January 2012 in the appeal in the Scott case from this Office to the Board. The appeal was dismissed.
36. The outcome of the investigations carried out in the Scott case into the activities of Wayne, Gary and Quantum Leap are relevant to this determination and I do not intend repeating the investigation here. I refer to the Scott case and the decision on appeal which must be read with this determination.

37. It is important to point out that the Board of Appeal in the Scott case did not upset any material findings of fact that emerged from investigations carried out by this office into the activities of the respondents.

38. The respondents, in particular Wayne and Gary are aware of the Scott case and in their response to this complaint pointed out that this office as well as the Board of Appeal was wrong. Moreover they point out that both this Office as well

as the Board did not have all the facts and were therefore misdirected. I will deal with these submissions later in this determination.

Profile of Complainants

39. The financial profile of the complainants is important and I point out the following:

39.1 As at March 2004, Maryke's insurance portfolio comprised of :

- An Endowment policy with Old Mutual at a premium of R728 – 64 per month;
- Retirement Annuities with Sanlam and Old Mutual at a total monthly premium of R1 416 – 83;
- Life cover with Altrisk at a monthly premium of R338 – 32 ; and
- Income Protector with FMI at a monthly premium of R518 – 49.

39.2 Petrus had an even more modest portfolio comprising of the following:

- Three policies with Sanlam and Old Mutual which, in February 2000, had a cash value of R8 840 – 00;
- A R/A with Old Mutual which had a cash value of R13 716 – 64.

39.3 Maryke was a physiotherapist in her own practice who became unemployed after the family relocated to Ceres;

39.4 Petrus was an electrical engineer working for a local contractor, he had to relocate to Ceres to improve on his work opportunities;

39.5 From the above information it is plain that the complainants were people of modest means who made investments and savings in conservative financial products.

40. Wayne, on his own version, was the Marx family's financial advisor since January 2000. On an annual basis Wayne met with the complainants to review their investments. There can be no dispute that Wayne was familiar with the financial profile of the complainants.

41. Wayne is a licensed financial services provider (FSP) in his own right and conducted business under the name and style of "Be Assured Financial Services". According to the records kept at the FSB, Wayne did not have a license to deal in Forex investments. It must be assumed that he dealt with Forex as an agent or representative of Quantum Leap (which incidentally also did not have a license but operated under the then exemption).

42. As an experienced FSP, Wayne knew the complainants well enough to know that they were people of modest means with no tolerance for risk.

Financial Advice

43. The respondents do not dispute that they rendered financial advice and intermediary services, as defined in the Act, to the complainants. They dispute that in rendering the service they did not conduct themselves according to the Act and General Code. In particular they deny that they were in breach of their general duties in terms of section 2 of the General Code.

44. It is not in dispute that Wayne raised the prospect of investing in Forex and that the complainants had no knowledge of this type of investment. Forex was not an option that was suggested by the complainants. It is not in dispute that but for the respondents' services, in particular Wayne's advice, complainants would not have invested in Forex.

45. It is equally not in dispute that Wayne advised Maryke as follows:

    45.1 That her Old Mutual policy was not performing and that she should consider withdrawing her funds from this policy and investing in Forex where she will earn a return of 3% per month;

    45.2 That the proceeds from the sale of her house should be invested in Forex rather than be paid into the bond of her new house. In this way, according to Wayne's advice, Maryke will be able to draw 2% per month, from the profits, as a salary and still reinvest 1%.

    45.3 Maryke accepted this advice and made two investments in Forex. The complainants relied on the respondents to provide them with sound advice and to act in their interests.

    45.4 According to Wayne's own version, he "discussed various options and the need for savings". It was then that he suggested Forex trading. It is Wayne's version that he recommended Forex trading as an option to save money.

The Financial Product

46. The complainants were required to sign a document that was prepared by the respondents which gave "authorisation" to Quantum Leap to manage their funds "according to its own mandate".

47. The document further "instructs" Quantum Leap to "carry out the following *speculative operations: To Buy or Sell Spot and Forward Foreign Exchange Contracts, Futures, Bullion and Option Related Instruments, through registered International Brokers."*(emphasis added)

48. Although the complainants signed this document, they could not possibly have understood what was meant by these "speculative operations". They merely placed their trust in Wayne and Gary and signed the document.

49. Forex trading is in itself a risky investment. However, the various options described as "speculative operations" are all highly volatile and risky investments. In all of these investment options there is a clear and realisable risk that the investor could lose all of their money. None of these investments can limit the scope of loss to no more than 5% of the investment. Wayne does not dispute telling Maryke that controls were in place and loss will be limited to 5% of the investment.

50. Both Wayne and Gary delivered numerous documents to this Office accompanied by lengthy written explanations of their conduct. In all of this this Office could find absolutely no evidence that any of the respondents actually told the complainants that an investment in Forex and Bullion trading could potentially result in loss of **all** of their investment. Nor can this Office find any

advice to the effect that this type of investment is not for investors with no tolerance for risk.

51. Most important, there is no basis provided as to how the complainants' circumstances landed themselves suitable to this type of product.

Appropriateness of Product

52. On Wayne's own version he, since January 2000, regularly conducted an analysis and a review of the complainants' financial requirements. He was very aware of the fact that the complainants were people of modest resources who were concerned about saving money and were certainly not able to tolerate any risk of losing their savings.

53. On the undisputed facts before this Office, an investment in Forex and Bullion trading was entirely inappropriate for the complainants bearing in mind their financial circumstances. They were not people who could take the risk in "speculative" investments. Wayne certainly knew this and so did Gary. They nevertheless advised complainants to put their savings into risky investments.

54. On the undisputed facts before this Office respondents contravened sections 2 and 8 of the General Code. Respondents were under a duty to inform the complainants and make full and frank disclosure of the risks in this type of investment and that it was not for them. They did the opposite.

Conflict of Interest

55. Both Wayne and Gary are experienced FSPs. There can be no doubt that ordinarily they would not have recommended such a risky investment to people of complainants' financial profile. They failed in their duty to act in the interests of client due to a clear conflict of interest.

56. Quantum Leap is run by Gary and although Wayne worked independently, he was also a director/manager of Quantum Leap. The focus therefore shifted from the interests of their clients to promoting business of Quantum Leap. This was not only reckless of them but they also contravened the General Code (see sections 3 (b) and 3A (2) (a)) in failing to manage the conflict of interest.

D. RESPONDENTS' RESPONSE

57. Both Gary and Wayne filed comprehensive responses to the complaint. Gary also responded on behalf of Quantum Leap. Their responses covered the following broad issues:

    57.1 A history of Quantum Leap;

    57.2 How the investment in Forex and Bullion was made on behalf of their clients;

    57.3 The role of Reymount, Kerford (Pty) Ltd (Kerford) and Kiran, as well as the licensing of these entities;

    57.4 How trading took place and what caused the loss, and in particular that they did not cause the loss; and

    57.5 Why the respondents cannot be held liable for the loss suffered by the complainants.

58. The respondents also dealt with the Scott case, submitting that this Office was misdirected in finding them liable. Gary set out in what manner this Office erred in the Scott case and urged that similar misdirection should not take place in this complaint.

59. The respondents then referred to the Appeal Board's decision in the Scott case and similarly submitted that the Board erred in dismissing their appeal.

60. In respect of the Scott case the respondents submitted that this Office did not have all the material facts and therefore misdirected itself. As for the Appeal Board the respondents merely state that the Board did not receive all the additional information filed by the respondents. On what basis this submission is made is not supported by any facts.

61. The respondents claim that Gary and Quantum Leap were experienced in Forex Trading. Exactly what this experience entails is not explained. Gary claims to have marketed Forex previously but is vague about the details. No basis can be found to accept that Quantum Leap and Gary were experienced in Forex investment. On the contrary the facts show that both Gary and Wayne were inexperienced and completely out of their depth.

62. The respondents presented lengthy explanations as to how Forex and Bullion trading takes place. The explanation includes why this kind of investment is "100% speculative" and carries a high risk. The purpose of this explanation was to support the submission that the respondents had nothing to do with how investors' money was used to trade in Forex and Bullion. The submission being

supported is that there was no negligence on the part of respondents for the loss of complainants' funds.

63. The respondents appear to have missed the point. It was not this Office's finding, in the Scott case, that the respondents were reckless or negligent in the way they traded in Forex and Bullion. This Office accepts that the trading was conducted by the respondents' "international trader", Kiran. The basis for the finding against the respondents in the Scott case was their negligence in trusting client funds to Kieran and Reymount. This remains an issue in this complaint.

64. In the lengthy response filed by the respondents they failed to address the principal issue in this complaint and that is, why they believed that this investment was appropriate for the complainants bearing in mind the latters' financial profile and tolerance for risk. Respondents had to explain why they believed, as licensed FSPs, that it will be better for Maryke to invest the proceeds of the sale of her house in Forex.

65. A detailed discussion and analysis of the facts regarding the respondents' decision to engage Kerford and Reymount is in the Scott case. In the response to this complaint no new facts were presented which would suggest that the findings in the Scott case were wrong. Accordingly the finding that the respondents were grossly negligent must stand.

66. Equally the findings regarding the licencing of Quantum Leap, Kerford and Reymount is dealt with in the Scott case. The finding that respondents failed to make a full disclosure to complainants that none of these entities were licensed by the FSB must stand. The respondents admit that all they did to assure their

clients was to show them a letter from Kerford that the latter and Reymount had applied to the FSB and were awaiting approval. There is no evidence that respondents explained to clients that they were merely operating under a temporary exemption and the license applications may be declined by the FSB.

67. Respondents claim that, in all their dealings, they acted with due skill, care and diligence. They then pose the question; *"what more is expected of the reasonable man?"* Again the respondents are misdirected, the test is not that of a reasonable man. The test is; what would a reasonably diligent licensed FSP have done in respect of their clients' needs?

68. In their response, the respondents set out an explanation of how trading in Contracts for Difference (CFD), also known as spot trading or Forex trading, takes place. They first point out that this Office as well as Judge Howie, in the Scott case appeal, "erred in their understanding of what was actually traded and the types of trades taken by Quantum Leap Forex". Respondents merely assumed that this Office and the Board of Appeal did not understand trading in CFDs. There was no misunderstanding in this Office.

69. However, it was interesting to read the respondents' explanation of how these trades are made. Two things became clear from their explanation:

    69.1 Firstly, by their own explanation it appears that the respondents knowledge of trading Forex and Bullion was at best rudimentary; and

    69.2 Secondly, this type of investment was high risk and certainly not suitable for conservative investors with no tolerance for any risk.

Risk Disclosure

70. In their response the respondents meticulously point out that the risk in the investment was disclosed and the complainants made an informed decision to proceed with the investment. They presented quotations from documents signed by complainants. Here are some telling quotations:

    - *" The client acknowledges, recognises and understands that trading and investing in securities as well as in leveraged and non-leveraged derivatives, is **highly speculative**, May involve an **extreme degree of risk** and is appropriate only for persons who, **can assume risk of loss in excess of their margin.**"*
    - *"**Risk –reducing Orders or Strategies:** the placing of orders (e.g. 'stop-loss' order, where permitted by local law, or 'stop- limit' orders) which are intended to limit losses to certain amounts **may not be effective** because market conditions may make it impossible to execute such orders."*
    - *"Strategies using combinations of positions, such as 'spread' and 'straddle' positions may be as risky as taking simple 'long' or 'short' positions.*

71. That the complainants signed such documents is not the test. What respondents had to do is explain the risks to complainants in plain language. There is no evidence that this was done. In fact the complainants point out that had Wayne

or Gary explained the risks, they would not have invested their savings in this investment. On the contrary, they were told that the risk, if any, will be limited to 5% of their capital as "systems were in place". This statement was not disputed. It is further not in dispute that neither Wayne nor Gary told the complainants that there was a risk of losing all of their invested funds and possibly even more. There are no probabilities that Maryke, a physiotherapist from Roodepoort, will have an understanding of "non-leveraged derivatives", "stop-loss orders", "spread and straddle positions", and "long and short positions". That such disclosures were signed by the complainants is of no assistance to the respondents for the following reasons:

71.1 These investments are, by their very nature, only suitable for wealthy and sophisticated risk takers;

71.2 The documentation signed is not written in plain language and is replete with jargon;

71.3 The complainants did not have the capacity to understand the investment and the risks involved;

71.4 The complainants placed their trust in their FSPs and relied on their guidance;

71.5 The respondents must have worked out that the complainants were not "persons who can assume the risk of loss". There is no record of advice where the respondents are shown to have advised the complainants that this investment was not suitable for them; and

71.6 There is equally no record of advice that, notwithstanding the risks, complainants insisted, based on an informed decision, that their funds be invested in Forex and Bullion trading.

No Negligence

72. Respondents point out that Judge Howie had no understanding of "this investment class". They then go on to explain how trading took place and were particular in pointing out that the loss was caused by an unanticipated spike in the price of gold (*"the loss that occurred was 100% as a result of an adverse market move.."*) They also point out that the loss cannot be attributed to any negligent conduct on their side.

73. This Office accepts that the respondents had no control over the price of gold. This is precisely why this type of trading is regarded as speculative and highly risky. On the respondents' own version, clients' funds were in the hands of Kiran, the "international trader". Respondents had absolutely no control over how Kiran traded clients' funds. Respondents' negligence lies in the fact that they saw this as an investment that was suitable for the complainants.

E. THE SCOTT CASE AND APPEAL

74. It must be stated at the outset that this Office is not carrying out a review of the Scott case and the decision on appeal to the Board. This Office merely deals with this in fairness to the respondents who submitted that the Scott case was decided in the absence of material facts.

75. This Office revisited the file in the Scott case and considered the facts now presented to it. There are no new facts which would have substantially changed the outcome of the Scott case and in favour of the respondents.

76. In the premises the Scott case stands. The appeal board's decision in this case has never been disturbed.

Quantum Leap

77. Respondents point out that Quantum Leap "had no participation, with regards to any advice or recommendations made to Marx". They also submit that Quantum Leap received and administered no funds; this was done by Kerford and Reymount.

78. Quantum Leap cannot escape accountability. It is not in dispute that the Forex investment in Quantum Leap :

    78.1 Was made on the advice of Wayne;

    78.2 Wayne was acting as a representative of Quantum Leap;

    78.3 Wayne is described on Quantum Leap's letter head as being part of its directors and managers;

    78.4 Gary is a director and key individual of Quantum Leap;

    78.5 Gary was actively involved in the transaction, having had meetings with complainants;

    78.6 The investment was marketed by Quantum Leap under an "authorisation" from the FSB;

    78.7 The monthly statements sent to clients were made by and came from Quantum Leap;

78.8 Kiran appears on Quantum Leap's letter head as its "international trader"; and

78.9 Kiran was now working exclusively for Quantum Leap and not for Kerford.

Quantum Leap cannot possibly distance itself from this investment.

Client Information

79. Respondents state that at all times clients were informed of the performance of their investments. They refer to the monthly statements and the "live" internet account. The purposes of this submission is to make the point that at all times clients were aware of the losses being incurred by the trading activities in Bullion; and were willing to take the risk of further loss. This is far from the truth.

80. Respondents annexed to their response, as "C", a copy of a monthly statement. Annexure C does not relate to complainants' investment. It is not known to this Office who the client is as this information was deleted. However the statements received by the complainants are entirely different. This Office refers to a statement of Maryke's account dated 7th November 2005. This statement provides the following information:

80.1 The total capital invested is reflected as $92 810. 24;

80.2 the transaction month is October 2005;

80.3 the "nominal opening balance" is $95 581.33;

80.4 the "nominal closing balance" is $95 581.33;

80.5 as at 31/10/2005 a "transaction description" is stated as "Profit";

80.6 there were no debits and no credits; and

80.7 the following is stated:

"As mentioned before, bullion is slower than currencies and we are still holding our current trade.
Please note that profits or losses will be back-dated to when we entered this trade.
The current market over December is usually thin and unpredictable and there is a possibility we could be holding our bullion trade until January."

Whereas annexure C contains a summary of transaction events, the statement received by the complainants contained no such details.

81. The statement received by the complainants is entirely vague and misleading. What actually happened was that the price of gold spiked and the trade in Bullion had incurred substantial losses. This position was not reflected in the statement. In fact the statement creates the false impression that the clients' capital was still intact. In truth most of it was already lost.

82. As for the "live internet" account, according to complainants they had difficulty accessing it and even if they did access it they did not have the capacity to understand it.

83. In spite of the speculative nature of this investment, there was a duty on the respondents, as competent and responsible FSPs, to immediately inform clients as soon as a loss occurred. Clients have a right to know. Respondents failed to do so and the only reasonable conclusion to be drawn is that they practised a cover up in the hope that they could recover some of the money that was lost.

Maryke's Second Investment

84. The respondents try to distance themselves from Maryke's second investment. They suggest that Maryke, independently, deposited the money directly into Reymount' s account and that no application was made through Quantum Leap or through Wayne. There is no merit in this.

85. The second investment came from the proceeds of the sale of Maryke's house which was sold when they relocated to Ceres. It is Maryke's unchallenged evidence that when the money became available she consulted Wayne. It was the latter who advised her against paying the money into the new bond, for the house purchased in Ceres, but to invest in Quantum Leap instead where she will earn a return of 3% per month. Maryke took this advice and Wayne assisted her in making the deposit in a bank in Dubai. Wayne also received commission on this transaction. There are no facts that favour the probability that Maryke went along and without informing the respondents, independently deposited money in Reymount.

86. It must be add here that, in all the circumstances, Wayne's advice that the money should not be paid into the bond, but that it will be better for Maryke to

invest in the "speculative operations" of Quantum Leap, was nothing short of reckless.

Expert Van As

87. Respondents refer this office to the expert opinion of Johannes Jacobus Van As. This opinion was also presented to the Board of Appeal in the Scott case. Van As, *inter alia,* makes the following points:

    87.1 The position held by the trader was reasonable in the circumstances;

    87.2 The loss suffered was due to trades taken and not caused by some other reason such as theft;

    87.3 The loss would have been incurred even if a different trader and clearing firm was used.

88. No case was ever made out that the respondents committed theft or fraud. This was not the basis of the finding in the Scott case and nor will any such finding be made here.

89. Van As's opinion merely highlights the fact that this was a highly speculative and risky investment. It strengthens the view that a reasonably competent FSP can only recommend this investment to wealthy risk tolerant people.

F. THE LOSS

90. Respondents are adamant that they cannot be held responsible for their clients' loss. They offer the following main reasons:

    90.1 Clients were aware of the high risk in this investment;

90.2 At all times they acted with due diligence and care (in good faith);

90.3 Respondents had no motive to make a loss as they would be paid only where client makes a profit;

90.4 Quantum Leap cannot be expected to take responsibility for "adverse global market moves"; and

90.5 The loss was not incurred through the inappropriate choice of trader and clearing firm.

91. Respondents conclude with the startling assertion that "*if there was any negligence in any way, it was done with complete innocence…*"

92. In tendering the above reasons, the respondents conveniently fail to address the requirements of the Act and General Code. On the facts before this Office, the loss to the complainants was not caused by any shift in the price of gold. The loss was caused by the inappropriate and negligent advice for the complainants to invest their savings in Forex and Bullion trading. No FSP can "innocently" contravene the Code of conduct.

G. CONCLUSION

93. On the facts before this Office and after carefully considering the respondents' response to this complaint, the following findings are made:

93.1 The respondents failed to comply with the FAIS Act whilst rendering financial services to complainant;

93.2 Respondents failed to make the necessary disclosures to complainants to enable them to make informed decisions;

93.3 Respondents were negligent in their conduct regarding their engagement of Kerford, Kiran and Reymount. See the Scott case and decision of the Board of Appeal;

93.4 Respondents failed to act in the interests of complainants as required by the FAIS Act and instead pursued business for Quantum Leap;

93.5 Respondents were in breach of section 2 of the Code as they failed to act with due skill, care and diligence;

93.6 Respondents were in breach of section 3(b)and 3A (2) (a) of the Code in that they failed to disclose and to manage a clear conflict of interest;

93.7 Respondents breached section 7 of the Code in that they failed to make full and frank disclosure of the risks to complainants; and

93.8 Respondents breached section 8 of the Code in failing to identify an investment that was appropriate to the complainants risk profile and financial needs.

The Consequences

94. It is the finding of this Office, for reasons stated above, that respondents' conduct occasioned complainants' damages.

95. The respondents must be held liable, jointly and severally, for the loss sustained by Maryke and Petrus.

H. QUANTUM

96. Maryke invested two amounts;

- First investment of R66 843 – 00
- Second investment of R560 000 – 00

97. Petrus invested R100 000 – 00.

98. In total the complainants invested R726 843 – 00.

99. Maryke recovered an amount of R69 742 – 24 and Petrus an amount of R18 630 -72.

100. Maryke sustained a loss of R557 100 – 76. Petrus suffered a loss of R81 369 – 28.

I. THE ORDER

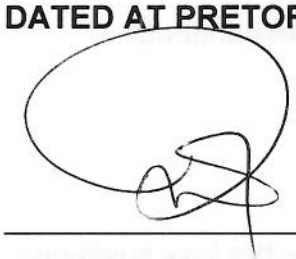
In the premises, respondents are ordered to pay the complainants, jointly and severally, as follows:

a) To Maryke, an amount of R 557 100 – 76;

b) To Petrus, an amount of R81 369 – 28;

c) Interest on the said amounts at 9,5% from a date 14 days from date hereof to date of payment.

DATED AT PRETORIA ON THIS THE 31st DAY OF OCTOBER 2014



NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS