IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

CASE NUMBER: FAIS 05921/10-11/KZN 1

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In the matter between:-

LIONEL WALTER OLDACRE **1st Complainant**

CATHERINE MARIE OLDACRE **2nd Complainant**

and

D RISK INSURANCE CONSULTANTS CC **1st Respondent**

DEEB RAYMOND RISK **2nd Respondent**

DETERMINATION IN TERMS OF SECTION 28(1) OF THE FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT NO. 37 OF 2002 ('FAIS ACT')

A. THE PARTIES

[1] First complainant is Lionel Walter Oldacre, a 75 year old male retiree of Village of Happiness, Margate, Kwazulu-Natal Province.

[2] Second complainant is Catherine Marie Oldacre, a 69 year old female retiree who resides at the same address as first complainant. Second complainant is married to 1st complainant in community of property. She is also represented by first complainant. For convenience, the 1st and 2nd complainant are collectively referred to as the complainant. Where necessary, I refer to the particular complainant.

[3] First respondent is D Risk Insurance Consultants CC, a close corporation duly incorporated in terms of South African law, with its principal place of business at 60 Van Riebeeck Avenue Edenvale, Gauteng Province. The 1st respondent is an authorised financial services provider in terms of the FAIS Act, with license number 12806.

[4] Second respondent is Deeb Raymond Risk, a male of adult age, a key individual and authorised representative of the 1st respondent. At all times material hereto, complainant dealt with 2nd respondent. I refer to 1st and 2nd respondent as Respondent.

B. INTRODUCTION

[5] On 21 September 2010, complainants lodged complaints with this Office. It appears from the complaints that in 2009 they invested an amount of R300 000 in Sharemax The Villa, a public property syndication scheme, on the advice of the Respondent. The amounts were invested in three separate investments of R100 000 each. The first one was made on 31 March 2009 in 1st complainant's name. On 28 October 2009, respondent again contacted

complainants. On his recommendation, 1st complainant made a further investment of R100 000 in his name and a further investment of R100 000 in 2nd complainant's name. At the time, complainants were largely reliant on income from their investments to support themselves.

[6] Monthly income payments according to complainants were paid but stopped in July 2010. Complainants received news that Sharemax was experiencing cash flow problems and that monthly payments would no longer be made. From what complainants learnt, new investments which were responsible for funding the interest payments to existing investments petered out, making it impossible to continue with the project. They later learnt that their capital was at risk.

[7] They state, bearing in mind their position as pensioners and their risk profile, the advice provided by respondent was clearly not a product of due skill care and diligence. The advice was neither fair, honest nor appropriate.

[8] Complainants found it inconceivable that at the time the investment was recommended to them, respondent was unaware that the Reserve Bank and Financial Services Board had been investigating Sharemax. They complained that Respondent neither alerted them to the high risk attached to the investments, nor did he advise them "that the Sharemax business activities and model were legally suspect and subject to criticism and condemnation in the investment and banking community." Had he done so, they say, they would not have made the investments.

C. BACKGROUND

[9] During March 2009, 1st complainant was introduced to respondent for the purpose of obtaining advice on his investments. According to him, he and his wife, (2nd complainant) had funds at the time with Stanlib Cash Plus Fund (R200 000) and Standard Bank Money Market account (R100 000).

[10] During the initial interview, respondent completed a risk profile for 1st complainant and identified his risk profile as “moderate”. On the basis of that risk assessment, 1st complainant was advised to look into investing in unit trusts, money market and / or property syndications.

[11] Complainants allege that Respondent’s motivation for the recommendation was that:

(a) the investment met 1st complainant’s need for monthly income and capital growth;

(b) it was compatible with his risk profile;

(c) the monthly income was guaranteed until the sale of the completed property;

(d) interest of 12.5% was guaranteed until completion of the project whereupon it would reduce to 11%;

(e) there was no other safe product on the market to compare with the Sharemax investment;

(f) the Sharemax product was not a “pyramid” scheme. Interest paid to investors was based on a very complicated formula which related to the periodic revaluation of the property and it was completely legal;

(g) the return of capital was guaranteed on the sale of property in ± 5 years; and

(h) the Financial Advisor’s commission on the transaction would be 6% of value of the investment but this would be absorbed by the promoter, Sharemax.

[12] On the basis of the advice from Respondent, 1st complainant made an investment of R100 000 in Sharemax The Villa (Prospectus 4) on the 31st of March 2009. On 28 of October 2009 he (1st complainant) was again contacted by Respondent and on his recommendation, made a further investment of R100 000. Second complainant whose risk profile was assessed as moderate invested R100 000. The last two investments were made through Prospectus 14 of The Villa.

[13] After receiving the agreed monthly payments up to and including July 2010, complainants were informed that Sharemax was experiencing cash flow problems and that monthly interest payments would no longer be made. Complainants state:

> *“it seems clear that we can no longer expect monthly interest payments and that our invested capital is at extreme risk... quite clearly this is not a position in which we, as elderly pensioners, wish to be, and*

in which we never would have been had it not been for our trust and reliance on the advice and recommendations of Mr D. Risk. "

D. COMPLAINT

[14] The complaint may be summarised as follows:

(a) On respondent's advice, complainants invested an amount of R300 000 into Sharemax The Villa. The investment was made in three separate investments of R100 000 each. In recommending the investments, respondent in violation of the Code of Conduct for Authorised Financial Services Providers and their Representatives, (the Code) failed to provide appropriate advice, given their circumstances. Complainants allege the advice was not in their interests.

(b) Had respondent advised them appropriately as demanded by the FAIS Act, they would not have made the investments into Sharemax;

(c) As a result of respondent's conduct, complainants have not only lost monthly interest payments but also their capital. They hold respondents liable to pay their loss.

E. RELIEF SOUGHT

Complainants have asked for the repayment of their capital of R300 000 together with interest as of August 2010.

F. RESPONDENT'S VERSION

[15] On 11 October 2010, the complaint was referred to Respondent in terms of Rule 6 of the Rules on Proceedings of the Office of the Ombud for Financial Services Providers, (the Rules), affording him opportunity to resolve the complaint with complainant.

[16] On 22 November 2011, Respondent filed his response. The response is in the form of what respondent terms an application in terms of section 27 (3) (c) of the FAIS Act. The relief sought is that the Ombud declare that it is appropriate that the complaint be dealt with by a court of law. The response can be divided into two sections. One section deals with the merits of the complaint and other deals with whether the Ombud is the appropriate forum to deal with the complaint. It is noted that Respondent states in paragraph 7 of his affidavit that he does not deal with the particulars of the complaints but reserves "the right to do so if and when it may become necessary to do so." However, as will become apparent, respondent does deal with the merits of the complaint. I summarise the response to the merits:-

(a) Respondent avers that 1st complainant was referred to him by one of his existing clients, a resident of the Darrenwood Village in Linden Johannesburg. They met on 24 March 2009 at the Darrenwood Village, where he learnt that 1st complainant was the Financial Manager of the Retirement Village. First complainant requested him to "switch" certain of his investments to a product of Liberty Life.

(b) During the course of their meeting, respondent conducted a comprehensive risk assessment of 1st complainant. He later performed a risk assessment of 2nd complainant.

(c) First, complainant was apparently well versed in financial matters. During this first meeting, he told respondent he was interested in investing R100 000.00 in an income producing product and that the amount constituted less than 5% of his investments. He further indicated that more funds were available for investing. Various investment options were discussed, including Sharemax which first complainant already knew about.

(d) Respondent submits that he is accredited by Sharemax to market its products. He also states that he handed a copy of Prospectus 4 of The Villa to 1st complainant to read and consider.

(e) Respondent met 1st complainant again 3 days later after he had had time to consider the prospectus. He (1st complainant) made it clear he understood the offer of The Villa and completed the relevant forms to invest R100 000.00. Sometime after the initial investment respondent was informed that first complainant had relocated to the South Coast of Kwazulu Natal.

(f) Some 7 months after prospectus 4,The Villa issued prospectus 14 and invited existing members by short message system (sms) to make further investments. Respondent states that he went to see 1st and 2nd complainant in Margate where he was informed by 1st complainant that 2nd complainant was interested in The Villa investment. He did a risk

assessment for the 2nd complainant. After explaining the product, he was of the view that she understood it. He thereafter handed a copy of prospectus 14 to 1st complainant. Both 1st and 2nd complainant invested R100 000 each.

(g) Respondent further asserts he has attended a number of seminars presented by Sharemax over the years and is *au fait* with its projects. All Sharemax projects have performed exceptionally well. They had an established track record and when complainant invested he had no reason to doubt the success of the projects. Initially, The Villa paid interest in respect of all three of complainant's investments. For reasons unknown to him, the interest payments ceased.

(h) Respondent denies the allegation that the advice he provided, was neither fair, honest nor appropriate with the complainant's best interests in mind. He denies that the advice given by him was not the product of due skill, care and diligence. He denies what he refers to as "defamatory allegations" by the complainants.

(i) With regard to the complainants' allegation that it was inconceivable that Respondent was not aware of the Reserve Bank and FSB's investigation of the business activities and funding model of Sharemax, Respondent states he was not aware of any such scrutiny. He further denies -:

i. That there was an "extremely high risk" attached to the investments, as alleged by the complainants.
ii. That Sharemax business activities and models were legally suspect and that he had knowledge of such.

iii. That there was extreme criticism and condemnation in the investment and banking community. He concedes that there were from time to time opinions expressed against the Sharemax model but that those were balanced out by opinions by other pundits.

(j) Respondent states that there are obvious discrepancies and disputes between the versions of the complainant and his on essential events. These factual disputes cannot be determined on unattested and untested conflicting versions of events made on paper. Oral evidence on oath and cross examination are required in order for the finder of fact to determine the truth.

(k) About the legality of Sharemax Model and the events surrounding The Villa, Respondent states that when he assisted complainants to invest in The Villa, he was not aware of any questions regarding the solvency and the legality of the business model of The Villa. It was only from about the middle of 2010 that he learnt through the public media that The Villa had defaulted on the interest payable to investors. He then followed the events surrounding The Villa in the press.

(l) He believes that the South African Reserve Bank, (SARB) has appointed judicial managers for The Villa and that eminent persons, Justice Hartzenberg and well respected economist Mr Dawie Roodt have been appointed to its board of directors. His understanding is that every attempt is made to complete the projects to prevent losses. At this point, it is unknown whether The Villa will recommence payment of interest and

complete its project or whether it may fail or even be liquidated. Whether or not any investor in The Villa will lose his or her investment and if so what the percentage of the loss may be and whether The Villa will be able to trade itself into profitability, are questions the answers to which are completely unknown at this stage. He states, it is also unknown whether any investor in The villa will suffer any actual loss. It is all pure speculation, one way or the other.

(m) In Respondent's view, the complaint is premature and as such no decision concerning any compensation claimed by complainant from him may be made before it is determined whether The Villa will fail.

(n) Respondent finally submits no decision can be made concerning his negligence on the grounds alleged by the complainants, unless it is established whether or not the Sharemax model was legal, what the causes of the non-payment of interest were and what was in the public domain when he discussed the investments with complainant.

[17] On 22 June 2011, this Office issued a Notice in terms of Section 27 (4) of the FAIS Act, requesting from the Respondent *inter alia:-*

(a) a copy of the record of advice,

(b) proof that all material and mandatory disclosures had been made;

(c) an explanation why the investments were in the interests of the clients; and

(d) evidence that the complainants were in a position to make an informed decision regarding the investment.

[18] In response, Respondent through his attorneys, Bieldermans Inc, stated that their client did not intend to respond to the notice, “save to emphatically deny the allegations” and “to fully reserve his rights to respond to these allegations in the appropriate forum and at the appropriate time.”

G. ISSUES

[19] There are four issues to be determined:-

(a) Jurisdiction;

(b) Whether Respondent in rendering financial services complied with the FAIS Act and the Code.

(c) In the event it is found that Respondent failed to comply with the Code, whether such conduct caused the damage complained of.

(d) Quantum

(a) Jurisdiction

[20] Upon referring the complaint to the respondent in terms of Rule 6 (b) of the Rules on Proceedings of the Ombud for Financial Services Providers, (the Rules), respondent advised this Office that he denies the allegations and fully reserves his rights to respond thereto in the appropriate forum and at the appropriate time.

[21] In response to a notice dispatched by this Office in terms of section 27 (4) of the FAIS Act, respondent lodged what he terms an application in terms of section 27 (3) (c) where it seeks that the Ombud determine that it is more

appropriate that the complaints lodged by the complainants be dealt with by a court of law and decline to entertain the complaints. In the affidavit annexed to the so called application, respondent states that he does not deal with the particulars of the complaints and reserves the right to do so when it becomes necessary.

[22] It is rather astounding that respondent regards the FAIS Ombud as not the appropriate forum to entertain the complaint lodged by complainants. In an attempt to undermine the administrative fairness processes built into the Act, respondent also claims not to be dealing with the particulars of the complaint, even though, as will be shown, he does. Authorised financial services providers like respondent are part of a regulatory regime which requires that they abide by their concomitant responsibilities[1]. They accept as part of their license conditions that they will abide by laws and regulations pertaining to their activities as providers, in particular the FAIS Act and its subordinate legislation. In terms Part XI, section 19 (1) of the General Code of Conduct for Authorised Financial Services Providers and their Representatives, respondent had a responsibility to inform the complainants that they may lodge their complaints with this Office. There has been no evidence presented to indicate that he complied with this provision.

[23] A further issue raised in the respondent's papers is what he calls obvious discrepancies and disputes between the versions of the complainant and his, on essential events. He states that these factual disputes cannot be determined on unattested and untested conflicting versions of events made

[1] Islamic Unity Convention v Minister of Communications 2008 (3) SA 383 (CC) para 48

on paper. Oral evidence on oath and cross examination are required in order for the finder of fact to determine the truth. Respondent however, decides not to specifically mention that the disputes are material, nor does he state which of the disputes are material. For the reasons that will appear in the determination, I disagree that there are material disputes of fact in this matter. In fact, respondent has, wisely so, chosen not to particularly point to any specific issue as a material dispute of fact.

[24] It is perhaps apposite to refer to the complaint. At the heart of the complaint made by the complainants is the criticism that respondent provided advice that is not appropriate for their circumstances and accordingly not a product of due skill, care and diligence. Complainants further allege respondent failed to alert them to the risk posed by the Sharemax investment. Had the respondent done so, they would not have invested their retirement funds into Sharemax.

I note however, that respondent in his papers summarised the complaint against him as based on negligence. He states:-

'*The complaints against me were made after the Villa stopped paying interest. The Oldacres now allege that I did not provide fair, honest and appropriate advice with their best interests in mind and that I did not give advice that was the product of due skill, care and diligence.*'

He goes on to state, '*What is in essence alleged is that I acted dishonestly – thus fraudulently – or negligently. I deny these defamatory allegations. (I again reserve the right to deal with them in due course, should the need to do so arise)*'.

[25] In fact, the complaint is about alleged violations of the Code, which the respondent as a provider is bound to comply with when rendering financial services to clients. The allegation that the respondent, in advising the complainants offered advice that was inappropriate when taking into account their circumstances, is a matter of compliance with the Code, and so is the allegation that he failed to disclose risk. In order to demonstrate compliance with the Code, he must produce records relating to the rendering of the financial services to the complainants.

[26] A mere reading of Part II, section 3 (2) (a) of the Code gives the mischief the legislature sought to address. The section provides that a provider must have appropriate procedures and systems in place to:-

(i) record such verbal and written communication relating to a financial service rendered to a client as contemplated in the Act, this Code or any other Code drafted in terms of section 15 of the Act.

(ii) store and retrieve such records and any other material documentation relating the client; and

(iii) keep such client records and documentation safe from destruction.

(b) All such records must be kept for a period of five years after termination, to the knowledge of the provider, of the product concerned or, in any other case, after the rendering of the financial service concerned.

[27] In essence the section was aimed at avoiding finger pointing and allegations of he said, she said. It is meant to enable anyone looking objectively at the

issue to establish what statements were made to the client prior to the conclusion of the contract.

[28] The demand that the matter be referred to a court without any cogent reasons in order to accommodate respondent's right to have the dispute determined therein cannot be read in isolation of complainant's rights to have the matter determined by this Office. The aim behind section 20 was to provide access to justice to members of the public without being inhibited by cost consideration. Given that respondent has provided no cogent reason other than to place baseless constitutional attack and vague references to a dispute of fact in essential areas, it can be said, is lacing disingenuous. He is aware that complainants have lost retirement funds and can therefore ill afford the legal costs to go and joust in court.

This Office has jurisdiction to entertain the complaint.

b) Whether in rendering the financial service to complainant, respondent failed to comply with the Code.

[29] Complainants' complaint is that in recommending the investments, respondent failed to provide appropriate advice. Further respondent failed to act with due skill, care, diligence and in their interests. Had respondent acted properly, they would not have made the investments under any circumstances.

Replacement of a financial product

[30] According to 1st complainant, the funds were initially invested in Stanlib Cash Plus Fund A (R200 000) and Standard Bank Money Market account (R100 000), both being unit trusts. On the respondent's advice, the funds were transferred out of these accounts and into the Sharemax The Villa Retail Park Holdings Limited Prospectuses 4 and 14 respectively. Of course, there is the allegation made by respondent that 1st complainant wanted to invest in Sharemax and already knew it. One would expect such important detail to have been specifically recorded in the documents produced by respondent in relation to the financial service rendered to complainants in line with the demands of section 8 (1) (a), (b) an (c) of the General Code. There is not a single detail referring to financial product experience in relation to 1st complainant in the records furnished by respondent.

[31] Further, given that the Sharemax transaction was a replacement, respondent was obliged to have complied with section 8 (1) (d) of the General Code. I have perused all documentation submitted and could not find anything from the respondent's papers evidencing compliance with the requirements of the section. Section 8(i)(d) of the General Code provides that a provider must, where the financial product is to replace an existing financial product wholly or partially, fully disclose to the client the actual and potential financial implications, costs, and consequences of such a replacement, including, where applicable, full details of-

(i) fees and charges in respect of the replacement product compared to those in respect of the terminated product;

(ii).....

(iii).....

(iv).....

(v) **the material differences between the investment risk of the replacement product and the terminated product**, (own emphasis)

(vi) penalties or unrecovered expenses deductible or payable due to termination of the terminated product,

(vii) to what extent the replacement product is readily realisable or the relevant funds accessible, compared to the terminated product.

[32] None of the documents provided by the respondent show the required comparison between the terminated and replacement products, including but not limited to a comparison in respect of liquidity and risk as the section demands.

[33] The Sharemax product is fundamentally different from the money market investment from which complainants' funds came. A collective investment scheme pools the money of a number of investors who want to invest in shares, bonds and money market instruments. The total fund is then divided into individual units containing the same apportioning of assets as the funds. The collective investment scheme concept offers full time management by professionals. This allows investors to gain the benefit of investing in a

diversified (own emphasis) portfolio even if investing a small amount.'[2] The Code is aimed at assisting clients to make an informed decision.

DISCLOSURE OF RISK AND LIQUIDITY

[34] In his response, respondent furnished this Office with amongst others, annexures C and D. The annexures detail the risk profiling exercise respondent carried out for both complainants. The Code in Part III, section 8 (1) (b) and (c)[3] enjoins providers to, prior to recommending a financial product to clients, obtain relevant information from the client, conduct an analysis and identify financial products that will match the client's risk profile. Annexures C and D therefore were submitted in fulfilment of the demands of the aforementioned sections of the Code. I comment where necessary as I go through the document.

An analysis of Annexure C – in respect of 1st complainant reveals:-

- Question 1: What is the primary purpose of this investment?
  The answer selected states, 'Retirement planning if over 55 years'. The corresponding score for this answer is 8.

[2] Goodall B, Investment Planning, Lexis Nexus , Butterworths, Durban

[3] Section 8(1) (b) (c) provide: 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 the purpose 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 or any contractual arrangement.

- Question 2: Approximately how large a percentage of your current net worth is the amount you plan to commit to this investment?

  The answer selected states: 'Less than 5 %.' Complainant scores 10 for this answer.

- Question 3: I will need the money?

  '5-7 years'. For the answer, complainant scores 15.

- Question 6: **Have you ever invested in equities or equity funds**? (own emphasis)

  'Yes': Score 10

- Question 7: If yes, did you understand and feel comfortable with the level of risk involved?

  'Yes': score 10

[35] In respect of questions 6 and 7, the questions are misleading. The asset class, equities, to many people refers to a <u>regulated</u> class of investment, specifically, shares with listed companies. Where the entity is not listed, the word PRIVATE would usually precede the word equity to denote that the shares are in an unlisted company not subject to public scrutiny. Further, reference to equity presupposes a range or a mix of shares from different categories as opposed to a single stock of a particular entity. The risk attracted by the two classes, private and public companies is markedly different which places a duty on the provider to explain the distinction between the two. Herein lies the critical difference between what was sold and the

questions asked. When one examines risks associated with individual shares, there are two types of risk: systematic and unsystematic[4]. The distinction is crucial because, systematic risk affects almost all assets in the economy, while unsystematic risks affect a small number of assets.[5] It is therefore incorrect and unfair to ask a client whether he understands equities when what is being sold is an unlisted share in a single entity.

[36] Bearing in mind that the answers selected in this document are the basis of the recommendation, one concludes that respondent did not disclose the risk pertaining to what he sold to the1st complainant.

- Question 8: As an investor, where would you place yourself on the following scale?

  'Low – risk investment with slightly more potential for capital growth'. Score 4
- Question 9: What level of total return would you expect from your investment? 4 % represents a safer yield, while 13 % represents an investment carrying a higher level of risk.

  '13 %', score 15.

[37] Questions 8 and 9 are a further cause for concern. First complainant indicates that he prefers low risk in response to question 8 and scores a 4, the

[4]Firer C, Ross SA, Westerfield RW and Jordan B, Fundamentals of Corporate Finance, Fourth Edition, McGraw-Hill, 407

[5] 4 supra

second lowest score out of ten scores. In response to the kind of return complainant expects from his investment, he selects 13%, the third highest level of growth. For that answer he is awarded a score of 15. The two answers are clearly an indication that 1st complainant has no appreciation of risk, fundamentally, the relationship between risk and return. At this point, respondent should have stopped the sale and looked at other products that would align with complainant's risk profile.

I note the answer provided in relation to question 2, (see para 20) indicating the R100 000 investment made at the time was equivalent to less than 5 % of the 1st complainant's total networth. This in my view gives no licence to a provider to gamble with such funds, especially where there has been no disclosure of risk.

[38] I now consider annexure D, which documents the results of the risk profiling exercise in respect of 2nd complainant. Question 6 is the same as set out in annexure C. Second complainant however, responds to the question whether she has ever invested in equities with a 'No'. She scores 1. Question 7 asks whether she understood and felt comfortable with the level of risk involved. She answers, 'Yes'. She scores 10.

[39] Second complainant cannot understand or even be comfortable with the risk involved in 'equities' if she has never invested in equities. The comments I made in relation to these two questions in respect of 1st complainant in paragraph 34 are applicable, *mutatis mutandis.*

In response to question 8 she describes herself as a low to medium risk investor and scores a 6. In response to question 9 regarding the return she

would expect from her investment, she selects a return of 11 % and scores a 12. That she has no idea what equities are did not mean anything to respondent. Second complainant scored a total of 88. She is categorised as an assertive medium investor, similarly to the 1st complainant. I have no hesitation in concluding that both complainants did not understand what assertive medium investors are and the implication of such a term.

[40] The objective fact arising out of these two documents, annexure C and D allow no other conclusion other than that to both complainants the risk in the Sharemax The Villa property syndication was not disclosed. It is also fair to conclude that they both depended on the provider for advice. It appears from the response provided by respondent that he sold the product as low risk as he denies there is high risk associated with the investment.

The risk inherent in Sharemax The Villa

[41] I canvassed this issue in Barnes (2)[6]. The comments I made apply *mutatis mutandis* with the necessary changes. It follows that this determination needs to be read with the Barnes (2) determination.

Compliance with section 9 of the Code: The duty to maintain a record of advice

[42] According to section 9 of the Code, a provider must subject to and, in addition to the duties imposed by section 18 of the Act and section 3(2) of the General

[6] Barnes v FAIS 6793/10-11/GP 1 (2) paras 16-26

Code, maintain a record of the advice furnished to a client as contemplated in section 8, which record must reflect the basis on which the advice was given, and in particular:-

a) a brief summary of the information and material on which the advice was based;

b) the financial product/s that were considered;

c) the financial product or products recommended with an explanation of why the product or products selected or are likely to satisfy the client's identified needs and objectives;

d) where the financial product or products recommended is a replacement product as contemplated in section 8 (1) (d) –

I refer to annexure H, a document completed individually for both complainants. An analysis of annexure H reveals: -

On page 2, it is recorded:

'*We confirm that a risk profile was conducted and that you have been identified as a moderate investor and that you are comfortable with this profile or although you have been identified as such an investor you have decided not to select funds based on the risk profile but to rather select funds in the property sector*.

The overall tone of the statement indicates that while the complainants may have been moderate investors, they have nevertheless chosen to invest in the property sector. This gives the impression the Sharemax product posed less

risk for the complainants' risk tolerance, a fallacy exposed in the Barnes determination[7].

It is further noted in the document:

'W*e looked at investment products from the following investment houses:*

unit trusts, money market, and PIC syndications, after which you decided to proceed with an investment in following type of financial product:

property syndication.'

[43] From what can objectively be seen from the records, the very selection to go with the Sharemax investment was based on inaccurate information about the product. On respondent's version, it was presented to complainants as a low risk product. This would be a violation of the Code, specifically Part II section 3 (1) (a) (i) and (ii)[8]. There is nothing in this document or any other document furnished by respondent to this Office that satisfies the requirements of section 9 (1) of the Code.

H. FINDINGS

a) I am satisfied that respondent failed in his duty to disclose the material aspect of risk inherent in Sharemax, The Villa investment.

[7] Para 42 supra

[8] The Code in section 3 (1) (a) (i) (ii) provides that when a provider renders a financial service-

a) Representations made and information provided to a client by a provider-

b) (i) must be factually correct; (ii) must be provided in plain language, avoid uncertainty or confusion and not be misleading

b) Respondent's insistence that the investment was not high risk is untenable.

c) Respondent further failed to disclose the material aspect of risk in the Sharemax The Villa investment. I have found no evidence that the complainants were informed of the exact nature of the investment. I am persuaded that the complainants will still not understand Prospectuses 4 and 14.

d) Respondent failed to appropriately advise Complainants in that he failed to recommend a product commensurate with Complainants risk tolerance to address their needs.

e) Respondent failed to act with due skill, care and diligence in the interest of his client and the integrity of the financial services industry as demanded by the Code.

f) Respondent's contention is that no decision can be made on the question of his being negligent until the question of the legality of Sharemax funding model has been decided upon. This contention must fail. It is Respondent's choice to see the issues involved in this complaint as negligence. In fact, these are matters of compliance with the FAIS Act and the General Code of Conduct.

g) Respondent's contention that Complainants' complaint is premature as no one has answers as to whether the companies will succeed or not is also irrelevant. The issue is not whether some monies will be recovered by complainant at some future unknown date. The test is whether the advice,

given Complainants' circumstances, was appropriate. The advice provided was clearly inappropriate and not relevant to the Complainants' needs.

h) I have already disposed of the question of appropriateness of this Office to deal with this complaint in the *Barnes*[9] matter. It is further clear that there is no material dispute of fact in the matter.

I. QUANTUM

[44] Complainants invested R300 000 in the Sharemax The Villa. Respondent contends that the claim is premature; yet it is now two years since the Respondent made this assertion and no money has been recovered and no building activity has taken place on any of the sites. Complainants have not received any income since August 2010. For all the reasons already elucidated I am compelled to accept complainants' claim. An order therefore is to be made in the amount of R300 000**.**

J. ORDER

In the premises the following order is made:

1. The complaints are upheld;

2. Respondents are hereby ordered, jointly and severally, the one paying the other to be absolved, to pay to 1st Complainant the amount of R200 000 and R100 000 to the 2nd complainant in respect of the investments in The Villa;

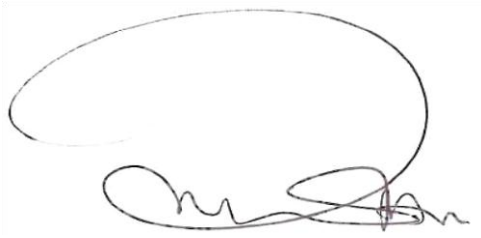
[9]Barnes 6793/10-11/GP paras 18- 24

3. Complainants are to hand over, upon full payment, all documents and securities, forgo any rights or interest pertaining to the investments The Villa in favour of respondents;

4. Interest at the rate of 15.5 % , from a date seven (7) days from date of this order to date of final payment;

5. Respondents are to pay a case fee of R 1000, 00 to this office within 30 days of date of this order.

DATED AT PRETORIA ON THIS THE 27th DAY OF JUNE 2012.



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NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS