IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA **CASE NO: FOC 3617/06-07/GP (5)**

In the matter between:

IAN GEORGE BUCHANAN SCOTT Complainant

and

WAYNE ASHLEY GRAY 1st Respondent

QUANTUM LEAP FOREX 181 (PTY) LTD 2nd 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] Complainant is Ian George Buchanan Scott, a male retiree who resides at No. 4 Azalea Place, Vale Road, Weltevreden Park, Gauteng Province.

[2] 1st Respondent is Wayne Ashley Gray, a male of adult age, 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 second 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 representative of 2nd respondent. As will become apparent in the succeeding paragraph, 2nd respondent's license confines it to rendering intermediary services only and not advice.

[3] 2nd Respondent is Quantum Leap Forex 181 (Pty) Ltd, a private company incorporated in terms of the laws of South Africa and an authorised discretionary financial services provider with FSP number 16994, with its principal place of business at Plot 7 Clifford Road, Chancliff, Krugersdorp, Gauteng Province. 2nd Respondent is authorised to render only intermediary services in terms of its license. 2nd Respondent is represented by Gary Gray (Gary), its authorised representative and key individual.

B. THE COMPLAINT

[4] Complainant is claiming compensation for the damages he allegedly suffered as a result of advice furnished to him by the respondents, which

advice, complainant claims, violated the duty placed on providers to act with due care, skill and diligence and the provisions of the FAIS Act.

C. INVESTIGATION

[5] The following are facts which emerged during investigations conducted by this Office. They are not in dispute.

[6] Complainant is 62 years old. Prior to his retirement, he worked for a financial institution for about 18 years. He had to take early retirement following some structural changes in that organisation. At the time, of receiving advice, complainant was about 59 years old.

[7] Sometime in August 2004, complainant invested an amount of R270 000, 00 into a forex investment. The funds were deposited directly into Reymount Investment Limited ('Reymount'), 'a clearing house with braches all over the world', according to respondents. The entity had its origins in Jersey. The investment would be traded by a trading company known as Kerford (Pty) Ltd, ('Kerford'), a company duly incorporated in terms of South African laws, with its principal place of business at 301 Corporate Place, 23 Fredman Drive, Sandton, Gauteng Province. The directors of Kerford at the time were, H Kalladi, SH Kaadoth, and one ADK Muhammed.

[8] During 2003, 2nd respondent agreed to act as introducing broker for Kerford following a discussion between one Lauren Botha of Kerford and Gary, acting as an authorised representative of 2nd respondent. At that stage, Gary and a number of family members and friends had their funds invested with Reymount, which funds were being traded by Kerford.

[9] A specific term of the agreement between 2nd respondent and Kerford was that the latter would only be remunerated from profits in excess of 3 % per month. If a loss was incurred, then respondents would render their services free of charge. A monthly statement would be given to the clients showing where their (3 % capped nominal) account would be, in order to work out whether profits could be withdrawn. According to 2nd respondent they:

> '*only get paid on the success of our trades and could only be paid when the client's account was in excess of his nominal account as indicated in our monthly statement. This nominal account indicated which part belonged to the client and which part belonged to Quantum Leap Forex.*'

[10] A further arrangement, which was meant to avoid '*a mass of untimely, costly and impractical monthly withdrawals',* as 2nd respondent puts it, related to monthly withdrawals. In terms of this arrangement, 2nd respondent undertook to advance the monthly withdrawals in order to make sure that the clients who required a monthly income would receive it on time. The nominal value of the client's account would then be reduced

by the advanced withdrawal amount. 2nd Respondent submits that details of the withdrawal process were discussed with representatives of the FAIS Department of the Financial Services Board (FSB), namely, Ms Wendy Hattingh and Mr James Molefe a few weeks after the 29 September 2004 deadline, (the date by which applications for authorisation had to be made.) By placing its own funds at risk through the advances, according to 2nd respondent only showed its confidence in the investment.

[11] In its license application, 2nd respondent applied for one Krishnamoorthy Thiruvengadam also known as Kiran to be its key individual. Kiran allegedly was in the employ of Kerford at the time. Kerford would in terms of 2nd respondent's license application be doing all the trading for 2nd respondent. 2nd Respondent's license was approved. From 2nd respondent's version there is no indication that Kiran's name was ever removed as key individual before the license was approved.

[12] The FAIS Act defines a key individual in relation to an authorised financial services provider as:

> ' any natural person responsible for managing or overseeing, either alone or together with other so responsible persons, the activities of the body, trust or partnership in relation to the rendering of any financial service. '

As set out above Kiran was, at all material times, an employee of Kerford and not the 2nd respondent.

[13] 2nd Respondent only introduced clients to Kerford and could not handle clients' investment funds. Clients invested directly with Reymount. The funds were traded by Kiran.

[14] During April 2004, 2nd respondent became aware of an e-mail circulated by the Jersey Financial Services Commission. The e-mail dated 14 April 2004, was a public statement warning the public against investing with Reymount. The e-mail reads a follows:

> '*The Commission has issued a direction under Article 20 (1) of the Financial Services (Jersey) Law 1998 as amended, (The Financial Services Law') to Reymount, a company incorporated in the island, requiring Reymount to cease conducting unauthorised investment business contrary to Article 6(1)(b) of the Financial Services Law.....'.*
>
> *The Commission wishes it to be known that:*
>
> '*Reymount has never been registered, or applied for registration, under the Financial Services Law. Therefore any financial services business, as defined in Article 2 of the Financial Services Law and carried out since 1July 1999, is a breach of Article 6 of the Financial Services Law.'*

[15] 2nd Respondent's reaction to this e-mail was to query it with Kerford. Kerford in turn advised 2nd respondent that the statement is only applicable to residents of Jersey. Kerford also produced Reymount's certificate of incorporation. 2nd Respondent does not however indicate

why it would choose to query the e-mail with Kerford and not with Reymount. As will become clear later, 2nd respondent's querying of the e-mail with Kerford was inappropriate because the question of incorporation was not in issue. The e-mail confirms the incorporation. It was the registration of the entity as a financial services provider under the Financial Services Law of Jersey that was in issue.

[16] On or about 17 May 2004, 1st respondent met with complainant for the first time. During this meeting, a client information form and a client letter of authority was completed and signed. The aim of this exercise was to provide authority to 1st respondent to review complainant's entire financial portfolio. It is common cause between the parties that complainant was aware of his financial position. He however, was interested in forex as he believed this presented greater potential to improve his income. Sufficient records have been submitted to this Office by respondents indicating the process they went through to identify complainant's needs and the advice offered to the latter. From the records a clear picture emerges that complainant had an interest in a forex investment.

[17] During the same month of May, Gary representing 2nd respondent, flew to London to meet with representatives of Reymount at the latter's offices. Gary indicated that he felt a responsibility to 2nd respondent's clients as well as to himself to check that all was in order. He was in London from 21

to 28 May 2004. Whilst there, he spoke to a gentleman whose name he cannot recall. However, on his own version at no stage was there any attempt to contact the Jersey Financial Services Commission, the institution that issued the e-mail warning the public about dealing with Reymount. Significant also is the fact that no attempt was made to contact the FSB here at home for details or information relating to Reymount.

[18] On 24 August 2004, 2nd respondent is provided with a letter by Kerford confirming that it (2nd respondent) is an 'introducing broker' for Kerford and that the latter is also assisting with trading decisions on 2nd respondent's clients' managed accounts. The letter further states that Kerford was not registered with the FSB and had only applied to be registered as a discretionary financial services provider, category 11 (2.13) for Foreign Currency Denominated Investment Instruments. This application to the FSB was only made on the 29 September 2004 under FSP number 18222.

[19] Complainant was promised online access to his account which would enable him to monitor performance of his investment. This however would later prove to be impossible to access due to some technical difficulties inherent in the system. As stated in paragraph 7 above, on 8 August 2004, following advice provided by 1st respondent, complainant made his first investment of R270 000, 00. The amount was transferred on 8 September

2004 into Reymount's Burling Bank account in Chicago through a bank transfer from Standard Bank in Westgate, Johannesburg. 1st respondent was personally present when the transfer was made. A Client Mandate & Trading Authorisation contract was duly signed. An important term contained in the mandate states:

> '*Authority to Quantum Leap to trade in speculative operations such as Buy and Sell Spot and Forward Foreign Exchange Contracts, Futures, Bullion & Option related instruments through,* ***registered International Brokers***
>
> ***'****Quantum Leap would act as an introducing Broker & would manage, place orders and trade the clients investment funds placed in an account with* ***Reymount Investment LTD at 40 Le Motte Street, St Helier, Jersey.'***

[20] The e-mail referred to in paragraph 12 indicates clearly that as early as April 2004, 2nd respondent was aware that Reymount is not a registered financial services provider. Not in Jersey and not in South Africa. The investment mentioned in paragraph 13 however falls outside the jurisdiction of this Office as it was made prior to 30 September 2004, the date on which the FAIS Ombud became empowered to accept complaints for investigation and adjudication.

[21] On 18 January 2005, complainant made his second investment of R130 000, 00 into Reymount in Chicago through a bank transfer made from Standard Bank, Westgate, Johannesburg. 1st respondent states in his reply that he neither advised nor assisted complainant to invest this further amount on the 18 January 2005. He however concludes by stating that after much discussion between himself, Gary and complainant about the investment a new client mandate was signed by complainant and a 2% advance was agreed upon between the parties. This time, instead of referring to Reymount, 40 le Motte Street, St Helier, Jersey, the mandate simply states, '*Reymount Investment Ltd, an Internationally Registered Clearing Firm*'. At this point, it must be mentioned that on respondents' own version, there was no basis for them to communicate to complainant that Reymount was registered internationally because the entity was not registered. Prior to making this investment, complainant signed an information sheet furnished to him by 2nd respondent on 15 January 2005. The information sheet provides as follows:

> '*I Ian George Buchanan Scott ID No: (...ID number set out.....) hereby confirm that my* ***Forex Investment*** *with Quantum Leap Investments 181 (Pty) Ltd was explained to me and I am prepared to invest in* ***Forex Speculation.'*** (own emphasis)

[22] On 5 May 2005 the FSB released a statement to the media indicating that Kerford's license application had been declined on 12 April 2005. The

statement further stated that Kerford had lodged an appeal but finally withdrew it. This meant that Kerford was not allowed to render financial services in South Africa.

[23] On 11 May 2005, the FSB warned 2nd respondent that Reymount would not be recognised as a clearing firm. 2nd Respondent was given seven working days to provide an alternative clearing firm for its operations. However, after much discussion, an extension was granted. 2nd Respondent then approached Kerford for an alternative clearing house and was provided the names of Chicago Forex and Kerford UK. These names were however also rejected by the FSB. 2nd Respondent then approached the Forex Intermediaries Association (FIA) a recognised body at the time in terms of section 6 of the FAIS Act, for a list of clearing firms. 2nd Respondent later gave the names of IG Markets and Saxo Bank to the FSB. There was however one obstacle standing in the way of the 2nd respondent to doing business with either entity. Neither entity would approve a contract with the 2nd respondent until 2nd respondent's license had been finally approved by the FSB. It needs to be mentioned that 2nd respondent was operating under an exemption at the time.

[24] In spite of the warning by the FSB that 2nd respondent was to desist doing business with Reymount and Kerford 2nd respondent decided to invest further funds with the very same entities. 2nd Respondent states:

'Trading was going well and I (Gary Gray) decided to invest additional funds with Reymount ... for myself and transferred funds to Reymount, Burling Bank, Chicago, USA.'.....

'*Kiran's investment decisions where (sic) exceptional as can be seen by the following examples. ...'*

2nd Respondent then sets out a breakdown of a few accounts indicating what would appear to be impressive returns on clients' investments.

[25] During July 2005, complainant made another investment of R200 000, 00 into Reymount's account from Standard Bank, Westgate, Johannesburg. A tax clearance certificate was procured and a deposit was later made into Reymount. This time, Reymount's bank details had changed to Standard Chartered Bank in Dubai. 1st Respondent states in his reply that he neither advised nor assisted complainant with this particular investment, save for helping with the deposit. 1st Respondent would however not deal with the question of by whom, how or why a tax clearance certificate was procured in respect of both the January and July 2005 investments, if he was against the idea of making these investments. I deal with this point in detail in the determination section.

[26] On 7 September 2005, 2nd respondent in conjunction with Kerford, decided to take what is referred to as a short position in gold. (A short position involves selling shares one does not own after having borrowed

from another party at a cost, in anticipation that the price of those shares might decrease. The borrower then buys back the shares at a lower price and pays them back to the original lender, making a profit in the process.) The move however is not a forex trade. Forex trading is a term that refers specifically to trading in currencies. On 21st September 2005, 2nd respondent found out that its application for a license as a financial services provider had been approved. At this point it must be mentioned that 2nd respondent's continued dealings with Kerford is astonishing, given that at this point it had long been informed that it is not to deal with either Kerford or Reymount as both entities had been rejected by the FSB. On 2nd respondent's version, Kiran was entrusted with all its clients' investments and was making all investment decisions. What precisely made respondents trust Kiran to the extent they did is a mystery? As will become clear in this determination, respondents' implicit trust in Kiran had no basis whatsoever. They did not even know the man. Why respondents would compromise their clients' financial well being to such a degree is simply beyond comprehension.

[27] As at 21 November 2005 2nd respondent and Kerford were still holding their position in gold. By this time the price of gold was on the decline but the 2nd respondent continued holding the gold position in the hope that the price might improve. In the meantime complainant had made withdrawals of R134 514, 00 from the investment. It is around this time that 2nd

respondent and Kerford decided to lock the trade. (This refers to the action of buying shares in the opposite direction - in this case to go long on the shares in the hope of preventing further losses. It is a way of buying time until the market turns in one's favour). The belief was that gold was going to reach lofty heights by the end of 2005 and ascend to record levels during the first quarter of 2006.

[28] By 25 April 2006, all investors' accounts were down by a record 90 % and they were still locked in the gold trade following the decision taken on 7 September 2005. (Refer to paragraph 26) Several reasons were furnished by 2nd respondents as to why it remained in the gold position. The reasons cited *inter alia*, were world events such as hurricanes Katrina, Rita and Stan; the London Bombings and record oil prices in Iran and Iraq. For the record it is to be noted that respondents have not furnished a single record to support the view that the funds were indeed lost in the gold trade. In respect of each of the reasons cited for remaining in the gold position, the following can be stated:

28.1 The London bombings occurred on 7 July 2005 and the gold position was taken on 7 September 2005;

28.2 Hurricane Katrina struck from 23 August to 30 August 2005. This was about two weeks before the gold trade;

28.3 Hurricane Rita struck from 17 September to 26 September 2005;

28.4 Hurricane Stan struck from 1 October 2005 to 5 October 2005, a very weak hurricane that touched the Gulf of Mexico;

28.5 Record oil prices were indeed experienced in 2005 but oil broke the $60 levels in June 2005 already and went even higher due to hurricane Katrina;

28.6 The invasion of Iraq started in March 2003; therefore, the impact on gold would have already been felt.

From all the foregoing it would be reasonable to conclude that respondents are simply looking for ways to justify what happened to their clients' funds, when they actually do not have a clue as to the fate of those funds.

[29] Complainant on 12 April 2006 sent a fax to 2nd respondent instructing it to close all trades in gold bullion with immediate effect. On 5 May 2006, 2nd respondent became aware of an article that appeared in the Chicago Tribune with the Headline, '*Loophole allows currency schemes to flourish*'. The article details how federal agents confiscated assets and froze bank accounts of one Puthankote Aboobaker, the man allegedly behind both

Reymount and Kerford. It is around this time that Kiran absconds after he is shown the article by the 2nd respondent. He is now believed to be trading somewhere in Botswana.

[30] A response to the complaint was received from respondents. The response is a lengthy one. It is clear from the papers that respondents are in the habit of maintaining records. I set out below what, in my view, is the corner stone of respondents' case:

30.1 Complainant had a clear appreciation of the volatile nature of the investment. To support this submission, respondents cite that complainant was employed as a manager of a financial services company for at least 18 years. He therefore should be well aware of what he was getting himself to;

30.2 The risk involved in the investment had been disclosed to the complainant and a number of investment options were presented to him but he was intent on investing in forex as it potentially stood to bring higher returns than other suggested investments;

30.3 Complainant defied 1st respondent's advice and insisted on making his own decisions in making the last two investments on 18 January and July 2005 respectively;

30.4 In so far as the investments of 18 January and July 2005 are concerned, 1st respondent denies having advised or assisted complainant in any way;

30.5 2nd Respondent, his family and friends also lost money in the entire episode.

Respondents refute all claims of wrongdoing and assert that they had complied with the FAIS Act as required.

D. DETERMINATION AND REASONS

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

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

31.1 Whether respondents made the necessary disclosures to complainant to enable him to make informed decisions.

31.2 What action, if any did respondents' take after being advised not to deal with Kerford and/or Reymount;

31.3 Whether respondents acted in the interests of complainant as required by the FAIS Act.

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

[32] If it is found that respondents' actions violated the FAIS Act, then it must be established:

32.1 Whether respondents' conduct occasioned complainant's damages; and if so;

32.2 The quantum of such damages.

[33] I point out firstly, that a number of documents were submitted by respondents in support of their case. However, no document was submitted to specifically back the assertion that complainant went against advice provided by respondents and chose to continuously invest in Kerford.

[34] No document has been submitted to this Office to distance respondents from the investments of 18 January and July 2005 made into Kerford. Section 8 (4) (b) of the General Code provides for an event where the

client elects to conclude a transaction against the recommendations of the provider. The section states:

> '(4) Where a client-
>
> (b) elects to conclude a transaction that differs from that recommended by the provider, or otherwise elects not to follow the advice furnished, or elects to receive more limited information or advice than the provider is able to provide, the provider must alert the client as soon as reasonably possible of the clear existence of any risk to the client, and must advise the client to take particular care to consider whether any product selected is appropriate to the client's needs, objectives and circumstances.'

[35] There is no reason why respondents (who understand the importance of record keeping) would not have maintained that record if they wanted to be taken seriously that complainant acted on his own. The only rational conclusion to be made in the circumstances is that respondents were not only recommended the two investments, they actively encouraged the process by assisting the complainant with tax clearance certificates, reserve bank clearances and requested complainant to sign on a new mandate. In addition, respondents facilitated access to Reymount and Kerford.

[36] Whether respondents made the necessary disclosures to complainant to enable him to make an informed decision.

The licence status of the various entities

36.1 Investigations carried out by this Office reveal that respondents failed to disclose to complainant that:-

36.1.1 2nd Respondent was operating under an exemption and that its license application was pending before the FSB at the time of rendering financial services to complainant in January 2005;

36.1.2 Kerford was operating under an exemption and that its license was pending before the FSB at the time of making the investment in January 2005;

36.1.3 Kerford's license had been rejected and that respondents had been advised by the FSB not to deal with Kerford months before complainant made the investment in July 2005;

36.1.4 Reymount was trading under an exemption at the time of making the first investment in January 2005;

36.1.5 In May 2005, the FSB had warned 2nd respondent that Reymount's license application had been rejected;

36.1.6 The Jersey Financial Services Commission had issued an e-mail warning investors against dealing with Reymount, an unauthorised financial services provider.

36.2 At the time of making the first investment in January 2005, all three entities that complainant was dealing with were trading under an exemption. In terms of part IV, sections 5 (b) to (g) of the General Code a provider other than a direct marketer rendering a financial service to a client must at the earliest reasonable opportunity furnish the client with certain information. Where the information was provided orally, the provider must confirm it in writing within 30 days. Specifically, in terms of sub-section 5 (g) respondents were obliged to disclose to complainant that all three entities had no license and that the entities were trading under an exemption. I shall not go into the details of the wisdom of granting a general exemption of this nature as this issue was adequately dealt with in the determination of *Selwyn Comrie & A v Ewing Trust Company Limited* FOC1807/05/KZN (5). In that determination it was specifically mentioned that the FAIS Act provided no basis for a blanket exemption and that the exemption was meant to be applic*a*tion specific. Respondents ought to have disclosed to complainant that all the entities were trading under an exemption.

Pertinently, investing in an institution that was operating under an exemption carried with it the risk that in the event that the authorisation was eventually rejected by the FSB, the entity concerned would have to refund all investors. Any prudent person would then exercise caution when dealing with such an entity. That this was never brought to the attention of complainant was a fatal error of judgment on the part of respondents.

36.3 In addition, Board Notice 94 published in the Government Gazette 23820 of the 23rd of September 2004 provides in section 4 that:

> 'The exemption referred to in paragraph 3 is subject to the condition that the applicant must during the currency of the exemption referred to in that paragraph inform in writing (including any electronic communication) all clients of their rights to submit complaints (if any) against the applicant to the Ombud for Financial Services Providers....'

There is no evidence that complainant was ever made aware that 2nd respondent, Kerford and Reymount were trading under an exemption. Worse still, no attempt was made to counsel complainant about the implications of trading under an exemption. Specifically, complainant ought to have been warned that in the event that the FSB had rejected the licence of any one of the entities which traded under an exemption, that entity would have had to cease trading. Respondents ought to have informed complainant of this. They did not.

The email from the Jersey Financial Services Commission

[37] The e-mail from the Jersey Financial Services Commission was a public warning indicating that Reymount had never been authorised and that its rendering of financial services to the public was in violation of the Jersey financial services law. This is the e-mail which respondents apparently took up with Kerford and were told that the e-mail applied to Jersey citizens only. In addition to this, Gary (of 2nd respondent) felt it necessary to travel to Jersey to make enquiries about the e-mail. On his own version, he did not seek any information from the Jersey Financial Services Commission itself, preferring to make random enquiries with people whose names he cannot recall. 2nd Respondent also did not seek any information from the FSB in the light of the e-mail.

[38] Respondents not only failed to seek assistance from the FSB about the e-mail, they also failed to disclose its contents to the complainant. By their actions, they denied complainant the opportunity to know that the entity he was entrusting his funds with was under scrutiny by the Jersey financial services authority. Whilst I am aware that respondents were not expected to know whether the contents of the e-mail were authentic or not, any reasonable person of the level of experience of the respondents ought to have known that such information, should it proven to be true, could have serious repercussions for their clients' investments. The respondents

therefore were obliged under the circumstances to take steps to establish both the authenticity as well as the implications of the e-mail. They could have written to the Jersey Financial Services Commission, they could have sought help from the FSB. Both 1st respondent and Gary are experienced providers with many years of experience. Most importantly, they advertise themselves to be specialists in the field and carry the accredited Certified Financial Planner (CFP™) symbol. It is therefore reasonable to conclude that respondents failed in their duties as providers by not establishing any information about the e-mail.

[39] The enquiry respondents made to Kerford was irrelevant and nonsensical for two reasons:-

39.1 Unless 2nd respondent knew otherwise, Kerford and Reymount were two different entities and ought to have been treated as such;

39.2 The e-mail contained matters of a regulatory nature and verification of such details should not have been sought from someone who might well be the offender or in cahoots with it, but with regulatory authorities themselves.

The risk/s

[40] Respondents were at pains to point out that complainant, with his level of experience as a former manager of a financial services company, ought to have appreciated the risks involved in this type of investment. Respondents also submit that complainant defied their advice. Specifically, it was submitted that, in so far as the investments made in January and July 2005 are concerned, complainant received no advice and no assistance from respondents. In addition, respondents aver that they disclosed the risk inherent in the product to complainant. On complainant's version, he understood the risks involved in forex. Nothing further needs to be said in that regard. However, there is something which respondents are deliberately avoiding to deal with here. There is a world of difference between risk inherent in a product and the risk associated with dealing with unlicensed, unlawful and fraudulent entities. Such risks cannot by any stretch of the imagination be equated with ordinary investment risk. The warning signs were there. First, there was the e-mail from Jersey, which respondents did nothing about. Second, respondents have not furnished this Office with any information indicating that they at least took steps to establish even the most basic information about the entities, Kerford and Reymount. Nothing in their version indicates they had ever had sight of either entity's audited financial statements. They never sought any assistance from the FSB regarding the stability of the entities;

they never sought approval of the entities in terms of Regulation 14, of Chapter VI (Government Notice 879 of 2003 (Government Gazette 25092 of 13 June of 2003 as amended).

[41] Respondents provided a letter (undated) sent by respondents to one Mr R Braver in Illinois in United States. The objective of the letter was to obtain certain information about Kiran, the trusted trader of Kerford. The letter also sought to establish whether Reymount's accounts in Chicago and London were frozen by the authorities. One would assume that the letter was sent after Kiran absconded. Too little, too late. The horse had long bolted from the stable by then. All of these enquiries should have been carried out before clients' monies were invested with little known entities represented by persons whose histories are unknown. For providers who hold themselves out as having expertise, respondents' conduct is dismal.

Information relevant to contractual status-joint and several liability

[42] I have perused respondents' response in its entirety and have not seen any reference to disclosure of information relevant to contractual status. Respondents' own version also does not address this important issue. In terms of Part IV, section 5 (b) of the General Code a provider or representative must furnish the client with concise details of his or her legal and contractual status including details regarding the product supplier. This information is:

> ‘to be provided in a manner which can reasonably be expected to make it clear to the client which entity accepts responsibility for the actions of the provider or representative in the rendering of the financial service involved and the extent to which the client will have to accept such responsibility;’

The provision is an important one. This is apparent from the instructive language used. In terms of the section the provider is not only expected to make an oral statement; he or she is obliged to confirm such information in writing within 30 days where such information is provided orally. Given the absence of information dealing with this important disclosure, I must assume that the complainant was not informed.

[43] The 1st paragraph of complainant’s letter of the 23rd January 2007 to this Office indicates that he has no idea who in law is responsible for 1st respondent’s actions. In this letter, complainant lodges his complaint against Wayne Ashley Gray, *‘who initially was the intermediary involved in selling the investment scheme to me and later was a member of the Directorship or Management responsible for marketing of Quantum Leap Forex (Pty) Ltd.....Other members of Wayne Gray’s immediate family are key members of the Quantum Leap company &, in particular Gary Gray who appears to be the main player or the driving force in the company.’* This particular provision of the Code makes it abundantly clear that as the employer of 1st respondent, 2nd respondent would be responsible for the former’s conduct whilst rendering financial services or

whilst acting within the course and scope of his duties with 2nd respondent. However, as stated earlier, 1st respondent is a financial services provider in his own right. From all the facts, it is clear that both 1st respondent and Gary dealt interchangeably with complainant.

[44] In all the circumstances, it would be just and equitable that any award of compensation be awarded jointly and severally with the one paying the other to be absolved.

Respondents' actions after it was advised by the FSB not to deal with Kerford and Reymount.

[45] During August 2004, almost three months after respondents were advised explicitly to desist from dealing with Reymount and Kerford, complainant made another investment of R130 000, 00. It must be stressed that complainant was not privy to any of the details regarding the authorisation of the entities. He did not know that respondents had been warned not to deal with the entities. Respondents were happy to carry on dealing with the entities in spite of the warnings by the regulator. That they did not know who they were dealing with is clear from their own version. They were happy to apply for Kiran to be a key individual for 2nd respondent even though they did not know who the man was. They had no way of verifying any details furnished to them by Kiran. They were simply fed

information from time to time about the excellent performance of the investments. They accepted this information without question even though the information could not and ought not to have been trusted by any reasonable person. The entities had not passed the regulator's requirements for a license. Respondents should have known that they were violating the law in their continued dealing with the two entities. If indeed it is to be believed that respondents did not assist or advise complainant, especially after the FSB's warning, they would have advised complainant in writing accordingly. They did not do so.

Did respondents act in their clients' interest as required by law?

[46] On respondents' own version, Kiran was the man who ran the show. There is no indication that respondents ever got to exercise judgment at any stage during the entire episode. The gold positions, both long and short, were taken on the advice of Kiran. How respondents are able to vouch that the funds were indeed lost in the gold trade begs the question as they had no way of verifying that information in any way. As it is, their own undated letter to Mr Braver enquiring whether Kiran was ever involved in bogus trades is sufficient indication that they themselves do not know what happened to the funds. They do, however, somewhat disingenuously find comfort in claiming that their clients took a risk for high returns and must therefore accept the loss. No doubt, the Code requires

that risk be disclosed to clients so that clients are in a position to make informed decisions. What the Code does not envisage however, is that clients would be put in potentially disastrous positions by placing their investments with bogus investors; and providers then being allowed to take the clinical approach that high returns come from high risk. On the basis of the information set out in this determination, it is rational to conclude that respondents failed to act in the interests of their clients.

Did respondent render the financial service with due skill, care and diligence?

[47] Due skill, care and diligence would at its most basic level demand that providers comply with the law. There can be no doubt that respondents should not have invested clients' monies after the entities' licence applications were rejected as that would be a violation of the law.

[48] Care and the desire to protect one's client's interests would have further demanded that respondents obtain information about the e-mail from the Jersey Commission before placing their clients' investment with Reymount.

[49] Respondents ought to have made the necessary disclosures about the authorisation status of the entities involved and the implications thereof, to their client. They should not have entrusted their clients' funds to a person

that they have no knowledge about, the said Kiran A rational conclusion to make therefore is that based on the circumstances of this case respondents failed to act with the necessary degree of skill, care and diligence.

Did respondents' actions occasion complainant's loss?

[50] There is no question that respondents were responsible for actively assisting and providing advice to their client that he invests monies into Reymount and Kerford. On their own version, 2nd respondent's responsibility was to introduce clients to Kerford. They would then take a back seat after the client's funds had reached their destination, (Reymount's bank account) and allow Kiran to make the decisions. It is no excuse that respondents did not physically deal with clients' funds. The point is, they sought out clients and assisted them to invest in entities, the soundness of which they knew very little, if anything about. It is logical to conclude their actions were the cause of complainant suffering damage.

CONCLUSION

[51] Based on the circumstances of this case, I have no hesitation in concluding that:-

51.1 Respondents actively advised and assisted clients to invest in unknown entities;

51.2 the advice provided was negligent considering that the authorisation status of the entities was never disclosed;

51.3 in so far as the investments made after the FSB had warned the respondents that the licence of the entities was not approved, the advice was wholly inappropriate and borders on reckless conduct;

51.4 important and critical information relating to the rejection of the licence of the two entities was withheld from complainant in total disregard of the law;

51.5 the respondents failed to act with due skill care and diligence.

The complaint is upheld.

Quantum of complainant's loss.

[52] In computing complainant's loss I do not take into account the initial investment made prior to the commencement of this Office's jurisdiction to hear complaints. Complainant invested an amount of R200 000, 00 in January 2005. During August 2005, he invested a further R130 000, 00. It is not in dispute that 2nd respondent had advanced monies to complainant

in the sum of R134 514, 00 in the form of monthly payments. On respondents' version, these amounts should have been recovered from the excess amount over and above his nominal account value. Neither of the parties was aware that by taking the advances, the risk that complainant could have been using his own capital was real in the circumstances. Complainant was also remitted an amount equivalent to R95 311, 25 at the time he closed the investment in June 2006. In all the circumstances, I deem it equitable that complainant is compensated the difference between his original capital, the withdrawals and the amount eventually remitted to him. This amounts to R100 174, 75.

ORDER

I make the following order:

1. Respondents are hereby ordered jointly and severally, the one paying the other to be absolved to pay complainant the sum of R 100 174, 75;

2. Respondents are to pay interest on the aforesaid sum at the rate of 15.5 % p.a from a date which is seven days (7) days from date of this order to date of payment;

3. 1st and 2nd Respondents are to pay a case fee of R1000, 00 each to this Office within 30 days of date of this order.

DATED AT PRETORIA ON THIS THE 3 DAY OF NOVEMBER 2009

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CHARLES PILLAI
OMBUD FOR FINANCIAL SERVICES PROVIDERS